***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

# BRIEF FOR APPELLANT GAITHER

In The
UNITED STATES COURT OF APPEALS
For The District of Columbia

384

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Nos. 21,780, 22,148

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TYRONE GAITHER, Appellant

v.

UNITED STATES OF AMERICA, Appellee

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Consolidated Appeals From the United States District Court
for the District of Columbia

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ROBERT L. WEINBERG
Counsel for Appellant Gaither
(Appointed by this Court)

1000 Hill Building
Washington, D. C. 20006

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In The
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# BRIEF FOR APPELLANT

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## ISSUES PRESENTED FOR REVIEW

1. Whether the return of an indictment, without a vote by the grand jury upon whether its terms do or do not constitute a true bill, violates the Fifth Amendment guarantee of indictment by a grand jury, or Rules 6 and 7 of the Federal Rules of Criminal Procedure.

2. Whether a defendant held to answer upon a void felony complaint should be afforded any relief, upon his timely pretrial motion, where the void complaint is the product of the Government's pattern of non-compliance with the express requirement of Rule 3 of the Federal Rules of Criminal Procedure, that a complaint be "made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

3. Whether Congress has conferred upon privately employed "special policemen" appointed pursuant to 4 D.C. Code §115, and acting in the exercise of their duties, the same powers of arrest as members of the Metropolitan Police Force.

4. Whether at the conclusion of trial the trial court should make findings of fact upon the complete record as to what the arresting officer had observed to give him probable cause for defendant's arrest, where the trial record has raised substantial issues as to the accuracy of the observations to which the arresting officer had testified on the pretrial motion to suppress.

5. Whether the trial court may properly hold that denial of grand jury minutes of Government witnesses was not prejudicial, without the Court or counsel having seen the minutes.

6. Whether defendant, arrested in a department store with merchandise in his possession, was prejudiced by the prosecutor's erroneous statement in summation that the arresting officer testified that he had searched the defendant and found defendant had no sales slip and no money, when such testimony had also been promised in the prosecutor's opening statement but was not in fact produced.

7. Whether post-verdict motions for judgment of acquittal or alternatively a new trial should be granted, where uncontroverted defense or rebuttal evidence shows the physical impossibility of essential evewitness testimony introduced in the Government's direct case.

* * *

The pending case has not been previously before this Court, other than upon procedural motions.

## STATEMENT OF THE CASE

Defendant-Appellant Gaither was convicted upon a single count indictment for grand larceny returned on August 30, 1967 against him and the co-defendant Charles Tatum, whose appeal in No. 21,864 is consolidated herewith. The indictment charged as follows:

> "On or about July 7, 1967, within the District of Columbia, Charles Tatum and Tyrone Gaither stole property of Woodward & Lothrop, Washington, D.C., a body corporate, of the value of about $131.00, consisting of five men's sport jackets of the value of about $131.00."

On December 8, 1967, the District Court, Gasch, J., heard and denied the Motion by Defendant Gaither to Dismiss the Indictment and the Motion by Defendant Gaither for Suppression of Evidence. (The grounds for these motions appear in the Argument portion of this brief.)

Defendants were tried before Judge Gasch and a jury on December 19, 20, and 21, 1967, and a verdict of guilty was returned on December 21. On February 6, 1968, the District Court issued its order and written opinion denying defendants' post-trial Motions for Judgment of Acquittal, or Arrest of Judgment, or New Trial.

On February 23, 1968, defendant Gaither came before the Court for sentencing, and was committed to the custody of the Attorney General pursuant to 18 U.S.C. §4252 for study and report to determine his eligibility for final commitment under the Narcotic Addict Rehabilitation Act. Notice of appeal was filed on February 23, 1968, and the District Court by order of March 7, 1968, authorized defendant Gaither to appeal without prepayment of costs. This appeal was docketed as No. 21,780. On May 6, 1968, the District Court entered a final order of commitment under the Narcotic Addict Rehabilitation Act, pursuant to 18 U.S.C. §4253(a). An appeal from this order of final commitment is docketed as No. 22,148.[1/] This Court, sua sponte, by order of

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[1/] The appeal in No. 21,780 from the judgment entered February 23, 1968, notwithstanding the temporary nature of the February 23 commitment to the custody of the Attorney General under 18 U.S.C. §4252, appears adequate to bring before this Court "all claims of error in the trial proceedings", Corey v. United States, 375 U.S. 169, 174 (1963). The appeal in No. 22,148 from the final commitment order of May 6 is taken out of an abundance of caution to preclude any question of finality of the February 23 judgment, but it presents no issue not encompassed by the appeal in No. 21,780.

August 7, 1968, consolidated these two appeals for all purposes. Previously this Court, sua sponte, had consolidated the appeal in No. 21,780 with the appeal taken by the co-defendant Tatum, which is docketed as No. 21,864.

## Evidence At Trial

The principal Government witness was special officer Leonard Peace, a full-time employee of the complainant Woodward & Lothrop, Inc. Peace testified on direct examination that, on July 7, 1967, he was on duty in the second floor Men's Sportswear Department of Woodward & Lothrop, and saw the defendant Tatum coming up the escalator to the second floor. He testified (over objection)[1] that he had recognized Tatum as someone he had seen stealing trousers from the same department two days previously, and whom he had followed from the store on that occasion. (Tr. 22-23, 37-38.)[2] Peace further testified that he observed the

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[1] While the overruling of appellant Gaither's objection to this testimony is not asserted as an independent ground of reversible error, it may be pertinent in the event that the Government urges that other claimed trial errors, discussed in points III and IV, do not in themselves warrant reversal.

[2] The following abbreviations are employed for record references to the transcript:

"Tr." designates the trial transcript.

"Dec. 8 Tr." designates the transcript of the hearing on pretrial motions held December 8, 1967. (Many of the pages in this transcript bear the prefix "S".)

"Arg. Counsel Tr." designates the transcript of the closing arguments, transmitted as a supplemental record on appeal.

defendant Tatum walk to the men's accessory bar, look around the area, walk back to the top of the escalator, look down, turn and walk to the sportscoat section "where he began selecting coats and putting them on the floor." (Tr. 16.) He then observed defendant Gaither come up the escalator and look in Tatum's direction. (Tr. 16.) "A few minutes past [sic] and Gaither went over to the area where Tatum had put the coats, held open a big shopping bag that he was carrying and Tatum rolled the coats and put them into the shopping bag." (Tr. 17.) Gaither then went to the top of the down-escalator, where Peace apprehended him and seized from him a shopping bag (Gov. Ex. 1) and five sports coats (Gov. Exs. 2 through 6) contained therein. (Tr. 17-19.)

Peace further testified on direct examination that he had had a "clear, unobstructed view" from approximately 50 feet away.

> "Q Mr. Peace, at the time you first observed the defendant taking the coats from the rack, how far away were you from the defendant?
>
> A Approximately 50 feet.
>
> Q Could you pinpoint some area in the courtroom. As far as I am from you or further?
>
> A At the time he was taking the bags, I would say almost to the wall.
>
> Q Did you have a clear, unobstructed view?
>
> A Yes, I did.
>
> Q Did there come a time when you got closer to the defendant?
>
> A Only when making the apprehension.

Q When the defendant was putting the coats into the bag, Government's Exhibit No. 1, how far away from the defendant were you?

A Approximately 50 feet.

Q At that time, did you have a clear, unobstructed view?

A Yes, sir." (Tr. 21-22.)[1/]

On cross examination, Peace testified that another special officer, Krauss, also participated in the surveillance. Krauss responded to a call which Peace made to the store telephone operator when Peace saw Tatum arriving. (Tr. 53-54.) Krauss did not participate with Peace in arresting Gaither. Special officer Wood and Peace "arrested Mr. Gaither at the top of the escalator. I went back to help Mr. Krauss apprehend Mr. Tatum." (Tr. 58.)

Krauss was standing two to three feet from Peace during Peace's observations. (Tr. 54.) Peace testified that: "I don't know what he saw, really," (Tr. 54) but acknowledged that his prior testimony 11 days before (at the hearing on the Motion to Suppress) read: "Mr. Krauss observed Tatum putting the coats on the floor and he also observed Tatum putting the coats into the bag that Mr. Gaither held." (Tr. 56; Dec. 8 Tr. 14.) Peace did not recall "giving those exact words" but did recall testifying "essentially" to what was transcribed. (Tr. 57.)

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[1/] In colloquy the prosecutor described Peace's testimony as stating "that he was 50 feet away from the individual. His testimony is that he had a clear, unobstructed view." (Tr. 31.)

Peace further testified on cross examination that Tatum, when he took the jackets from the rack, was not standing between two different racks of sports coats (Tr. 64), but was standing in plain view in the middle of an aisle. "You can walk straight down the aisle from where I was to Mr. Tatum." (Tr. 73-74.) Peace said that his view was not obstructed by any rack between where he was standing and where Tatum was standing. (Tr. 73-74.) According to Peace, the rack of jackets from which Tatum had taken the jackets was a "double rack of sports jackets built into the wall." (Tr. 71.)

Peace also testified that, in the two years that he had been at Woodward & Lothrop, he did not recall pants being located on a table in front of the sports jackets in question. (Tr. 72-73.) He acknowledged that he had previously drawn a diagram, which was marked as Defendant's Exhibit 2 at trial,[1/] and contained two parallel lines in front of the area designated "sports jackets". But he denied that the parallel lines represented a table on which pants were located. (Tr. 71-72.)

The Government's second witness, James Revell, an assistant buyer at Woodward & Lothrop, testified that the five sports coats had wholesale prices of $20, $33.50, $24.49, $24.49, and

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[1/] The same diagram drawn by Peace was marked as Defendant's Ex. 1 for identification at the hearing on the Motion to Suppress on December 8. The diagram, received in evidence at trial as Defendant's Ex. 2, has been transmitted to this Court as part of the record on appeal.

$29.38, respectively, totaling $131.86. (Tr. 85-86.)[1]

The remaining prosecution witness was special officer George Krauss of Woodward & Lothrop. On direct examination, Krauss testified that, responding to a call from the store telephone operator, he came to the second floor Men's Sportswear Department and joined special officer Peace. (Tr. 92-93.) Peace directed Krauss' attention to the sports coat rack, and observed Tatum "bend down and roll the coats up and then pick them up off the floor." (Tr. 93.) At that time he saw only Mr. Tatum's hands. (Tr. 97.) Afterwards Krauss "observed the movement over in that area near the sports coat rack" and saw Gaither leave that area carrying a Kresge's shopping bag (Gov. Ex. 1). (Tr. 94.)

On cross examination, Krauss testified that he was standing two to three feet from Peace when Krauss saw the coats being picked up from the floor, and that he remained in the same position next to Mr. Peace for some time. (Tr. 99-100.) He acknowledged prior testimony (at the Motion To Suppress hearing) that there was nothing in front of him that was not in front of Mr. Peace.[2] (Tr. 101; Dec. 8 Tr. 28.)

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[1] On cross examination, Revell was "not sure what these garments cost the manufacturer, but it would seem reasonable that they would try to make a profit themselves." (Tr. 88.) The Court ruled that defense could not show that Peace's original sworn complaint had placed a value of $265 on these items, ruling that the percent of Woodies' mark-up was immaterial to determining their value. (Tr. 88-90.)

[2] When asked the same question at trial, Krauss said there was a tie rack which he looked around, "but it was not directly in front of me" and did not obstruct his view, nor as far as he knew, Mr. Peace's view. (Tr. 100.)

Krauss admitted that, from his vantage point by Peace, the view of defendants was obstructed by the sports coat rack.

"Q Was there a clothing rack between you and Mr. Gaither and Mr. Tatum which prevented you seeing them?

A Yes, there was." (Tr. 102.)

Gaither and Tatum were standing behind that rack. (Tr. 103.) It was the only rack of sports coats, and the coats on the floor were lying part ways under the rack. (Tr. 104.) The rack was about as far from Krauss as the witness chair was from the second-to-last row of the courtroom. (Tr. 103.) Krauss remembered no clothing racks perpendicular to the sports coat rack behind which Tatum and Gaither were standing. (Tr. 104.) Once the sport coats had been lifted from the floor, Krauss could not see what happened to them, because his view of the scene was partially obstructed by the rack behind which Tatum and Gaither were standing. (Tr. 105-106.)

After the Government rested, defendant moved for judgment of acquittal. (Tr. 118-119.) Defendant argued that, because of the diametric contradiction between the testimony of the Government's two eyewitnesses who disagreed on whether the view was obstructed, the evidence would not enable the jury "to find beyond reasonable doubt that Officer Peace observed what he claimed to have observed." (Tr. 119.) The motion was denied.

(Tr. 120.) Defendant also renewed the pre-trial Motion to Suppress, on the basis of the record as supplemented by the trial testimony. Defendant contended that, because of the contradiction in the trial testimony, the Court as fact finder should not find that Peace had probable cause to arrest defendant Gaither. The renewed Motion to Suppress was denied. (Tr. 122-123.)

The principal defense witness for Gaither[1/] was Dale R. Thomas, a secretary to the Parliamentarian of the United States Senate, who for the past seven or eight years had also been a part-time employee of Woodward & Lothrop. (Tr. 136-137.) Thomas was employed in the second floor Men's Department in July of 1967. (Tr. 137.) Thomas testified that in July of 1967 there was a permanent built-in table containing pants immediately in front of the sport coat racks. (Tr. 137.) The distance between the built-in pants table and the sport jacket rack was about four feet, and was probably used for an aisle./ (Tr. 138-39.) If one were standing at the tie counter [the counter at which Peace and Krauss testified they were standing], you could see the rack in which sport coats were kept. (Tr. 140.) The table would not obstruct your view at eye level, but you could not see something that had been dropped behind the table on the floor. (Tr. 140-41.)

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[1/] The co-defendant Tatum called an alibi witness, Cornelius Anderson, who testified that Tatum was shopping in Woodies with Anderson immediately prior to Tatum's arrest. (Tr. 154-171.)

Thomas acknowledged on cross-examination that he would not have been working on July 7, but said that the same conditions prevailed before and after that date. (Tr. 137-38.)

Defendant also introduced into evidence a diagram of the second floor of Woodward & Lothrop dated June 23, 1967. It was stipulated between the parties, that if the maker of the diagram were called, he would testify that it was a portrayal of the second floor Men's Department as it existed at the time the diagram was made. The diagram was received in evidence as Defendant's Exhibit 4. (Tr. 143.)

In rebuttal, the government recalled Peace, who identified Defendant's Exhibit 4 and circled the area in which the incident had allegedly occurred. He placed on the diagram an "x" to represent "the location of the sport jackets on the rack" and a "O" to indicate where he had been standing. (Tr. 171-172.) On cross-examination, he placed a "y" denoting the place where he saw the jackets on the floor.[1/] He acknowledged that the "y" was directly behind a square on the diagram, and explained this by saying, "they are all movable and can be moved overnight." He asserted: "this is not a diagram of the

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[1/] He also testified, in contrast with Krauss, that he had not seen Tatum or Gaither standing behind any rack of sports jackets and that there was no rack of sport jackets behind which a person could stand. (Tr. 172-173.)

store as it existed at that time." He could not state what changes he recalled were made between June 23 (the date of the diagram) and July 7. (Tr. 173-74.)

## ARGUMENT

I. THE MOTION TO DISMISS INDICTMENT AND MOTION IN ARREST OF JUDGMENT SHOULD HAVE BEEN GRANTED BECAUSE THE INDICTMENT WAS VOID AND THE COMPLAINT WAS VOID.

(Record References: Complaint; Presentment; Indictment; Motion to Dismiss Indictment; Motion in Arrest of Judgment; Order and opinion denying post-trial motions; Dec. 8 Tr. S 2-12, 16-28.)

A. The Indictment Was Void Because the Grand Jury Never Voted As To Whether It Was Or Was Not A True Bill.

It appeared from the uncontroverted allegations contained in the pretrial Motion to Dismiss Indictment (Motion to Dismiss Indictment, pp. 2-3), which were not disputed by any responsive pleading or at the hearing upon the motion (Dec. 8 Tr. S 2-8, 19-23, 26-28), that the indictment returned against defendants had never been submitted to the grand jurors (other than the foreman) and that the grand jury never voted as to whether or not it was a true bill. The indictment was returned on August 30, but the only vote taken by the grand jury was on August 2, 1967, which was prior to the time that the indictment was drafted by the United States Attorney's Office. On August 2, 1967, the grand jury voted a so-called "presentment" that stated only the defendants' names and the statutory designation of the offense charged, grand larceny. The "presentment" did not indicate the date of the alleged offense, the property allegedly stolen, the alleged value of the property, nor the alleged owner of the

property. (See the Presentment, which was filed in the District Court with the Indictment on August 30, 1967, and is contained in the record herein.)

Defendant moved to dismiss the indictment on the ground that the foregoing procedure violated the Fifth Amendment and Rules 6 and 7, F.R.Crim.P. The motion was denied in an oral ruling, without opinion. (Dec. 8 Tr. S 28.) The same contention was renewed by Motion in Arrest of Judgment, and denied upon the basis of the pre-trial ruling. (Order and opinion denying post-trial motions, p. 2.)

The appeal upon this point, like the motions below, challenges the basic procedure followed by the United States Attorney's Office in obtaining indictments in this jurisdiction. It was not suggested below that the procedure herein was atypical for the United States Attorney's Office.

The challenged procedure may be summarized as follows: Prior to the drafting of an indictment, the grand jury hears the witnesses and votes on whether to "present" the defendant. In the event of an affirmative vote, a "presentment" form is filled out and is signed by the grand jury foreman.[1/] However, the "presentment" does not contain any of the essential facts which

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1/ This "presentment" is later filed, at the same time that the indictment is filed. Their filing is the initial entry recorded on the criminal jacket.

an indictment must recite. It states only the name of the defendant or defendants and the name or statutory designation of the offense charged. After the "presentment" has been voted and the "presentment" form signed by the foreman, the United States Attorney's Office prepares an indictment alleging facts constituting one or more counts of the offense designated in the "presentment". This indictment, prepared by the United States Attorney's Office, is not submitted to the grand jury for a vote on whether or not it is "a true bill". It is signed by the foreman beneath the heading "A True Bill" and is returned in open court.

1. The Challenged Procedure Violates the Fifth Amendment Guarantee of Grand Jury Indictment.

The Fifth Amendment provides, in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."

The Supreme Court has held that:

> "There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor." Costello v. United States, 350 U.S. 359,362 (1956).

Appellant contends that the challenged procedure violates the Fifth Amendment guarantee because the grand jury of the District of Columbia, unlike "its English progenitor", did not vote upon whether the bill of indictment was or was not "a true

bill". The circumstance that the foreman signed his name beneath the mimeographed phrase "a true bill" does not make the instant indictment a true bill within the contemplation of the Constitution and its framers.

The procedure followed by the "English progenitor" of the constitutional grand jury was well-known to the framers. It is described in Blackstone, Commentaries, Book 4, pp. 302-06. Under the procedure described by Blackstone and other authorities, at common law a bill of indictment was preferred to the grand jury by the Crown, and after hearing the witnesses, the grand jury voted that the bill was "a true bill" or "not a true bill". Ibid.; United States v. Cox, 342 F.2d 167, 186-89 (5th Cir. 1965) (concurring opinion of Judge Wisdom); 1 Stephen, History of the Criminal Law 273-75 (Franklin ed.).

In contrast to the procedure known to the framers, the procedure followed herein deprived the defendant of the right to have the grand jury determine by its vote whether the specific charge upon which he was tried was or was not "a true bill".

The procedure herein cannot be upheld upon the theory that the Fifth Amendment permits a "presentment" as an alternative to an indictment. Notwithstanding the labeling upon the form contained in the instant record, which is called a "presentment", it is not a "presentment" in the constitutional sense. See United States v. Cox, supra (concurring opinion of Judge Wisdom). The so-called "presentment" voted herein was far too vague to

inform the defendant of the charge intended by the grand jury and which he must be prepared to meet at trial. Nor was he in fact tried upon the "presentment" voted by the grand jury; he was tried upon the indictment drawn up by the United States Attorney's Office and not voted upon by the grand jury.

No reported opinion has been found passing upon the validity of the indictment procedure followed herein.[1] However,

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[1] Recently Judge Gesell of the District Court upheld the procedure in an unreported opinion in United States v. Jeffries, Criminal No. 623-68. Judge Gesell's opinion pointed out that no Federal case had discussed the issue, and held that the Federal

(continued)

a line of Supreme Court authority clearly establishes that the Fifth Amendment is designed to ensure that the defendant may be tried only upon the precise charge found by the grand jury, and not upon a charge amended, however so slightly, by the prosecutor's or court's construction of what the grand jury should have intended. Ex Parte Bain, 121 U.S. 1 (1886); Norris v. United States, 281 U.S. 619 (1930); Stirone v. United States, 361 U.S. 212, 215-18 (1960); Russell v. United States, 369 U.S. 749, 770-71 (1962). This Court applied the Bain doctrine in Crosby v. United States, 119 U.S.App.D.C. 244, 245, 339 F.2d 743, 744 (1964).

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Rules of Criminal Procedure did not resolve the question of whether the indictment must be drafted before the vote of the grand jury. The opinion relied primarily upon a dictum from Hale v. Henkel, 201 U.S. 43, 59 (1906), that an indictment "as often as not, is drawn after the grand jury has acted upon the testimony . . . ." Appellant's point, however, is not that the grand jury may not "act upon the testimony" by voting, after it hears the witnesses, that an indictment should be drafted. Appellant's contention is that, when an indictment has been drafted following a prior vote of the grand jury, the indictment in the specific terms in which it has been drafted must be submitted for the grand jury to vote upon whether such indictment is or is not a true bill.

A similar motion to that herein was also made in two other District Court cases, United States v. Wheeler, Criminal No. 1333-66 and United States v. Washington, Criminal No. 1373-66. In Wheeler, where the motion was first made, the Government did not file a response but asked for and obtained from the District Court a continuance in order to enable it to return a superseding indictment. In Washington, the motion was denied, without opinion, upon the ground that the Court found:

> "No holding by any Federal Court that grand jury procedures as followed in the District of Columbia violate the United States Constitution or the Federal Rules of Criminal Procedure . . . ."
> (Order filed June 30, 1967, Criminal No. 1373-66.)

The rationale of Bain was that:

> "if it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." Id. at 10.

The procedure herein involves a greater departure from the constitutional design than the amendment procedure invalidated in Bain. There at least the grand jury's findings had been set forth in a lengthy indictment voted by the grand jury, and the trial court's subsequent deletion of one phrase still left most of the grand jury's findings intact. Here, however, where the grand jury voted only a "presentment" devoid of all detail, there is no way to ascertain what specific facts the majority of the grand jury found.

By deciding himself upon the terms of the indictment without their submission to the grand jury, the draftsman of the indictment deprived appellant of his "right to be charged by a grand jury for the precise offense of which he was convicted," Crosby v. United States, supra, 119 U.S.App.D.C. at 245, 339 F.2d at 744. The United States Attorney's Office, of course, had no representative present during the grand jury's deliberations.

Rule 6(d), F.R.Crim.P. Thus the United States Attorney could not have been privy to the specific findings of the jurors, even if those were expressed during the deliberations. The only way that the United States Attorney's Office, the Court, and the defendant can properly be apprised of what facts the grand jury has found is by the contents of a written bill of indictment, which the grand jury has voted is "a true bill". That is the procedure practiced at common law, known to the framers, and preserved by the Fifth Amendment guarantee of "our constitutional grand jury . . . intended to operate substantially like its English progenitor." Costello v. United States, supra, at 362.

The trial court is without jurisdiction to convict a defendant on a felony charge different from that found by the grand jury. Ex Parte Bain, supra, at 13-14; Norris v. United States, supra, at 622-23; Crosby v. United States, supra, 119 U.S.App.D.C. at 245, 339 F.2d at 744; Carney v. United States, 163 F.2d 784, 788-89 (9th Cir. 1947); Dodge v. United States, 258 Fed. 300, 305 (2nd Cir. 1919). Therefore, the Motion in Arrest of Judgment which attacked the court's jurisdiction, as well as the pre-trial Motion to Dismiss the Indictment, should have been granted. Rule 34, F.R.Crim.P.

2. The Procedure Followed Herein Violated Rules 6 and 7 of the Federal Rules of Criminal Procedure.

The so-called "presentment" voted by the grand jury and contained in the instant record appears foreign to the scheme

of the Federal Rules of Criminal Procedure. The draftsmen of the Rules pointed out that no provision authorizing a "presentment" in the constitutional sense was included in Rule 7(a), F.R.Crim.P., "since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal Courts." Advisory Committee Note to Rule 7(a), par. 4, 18 U.S.C.A. following Rule 7. A fortiori the draftsmen of the Rules did not contemplate the use of a "presentment" not meeting constitutional standards, such as was employed herein.

Rule 6(f) of the Federal Rules of Criminal Procedure provides:

> "An indictment may be found only upon the concurrence of 12 or more jurors."

Rule 6(c) provides that the foreman

> "shall keep a record of the number of jurors concurring in the finding of every indictment . . . ."

Appellant submits that when the draftsmen spoke of an indictment being "found", they were using the term in its traditional common law meaning. That meaning, as appears from Blackstone, referred to the action taken by the grand jury upon an existing bill of indictment which was placed before them.

As Blackstone described the procedure, the grand jury were to endorse "on the back of the bill" either "not a true bill" or "not found", if the grand jury rejected the charge. If the

grand jury were satisfied of the charge, they would endorse the words "a true bill". "The indictment is then said to be found, and the party stands indicted." Blackstone, Commentaries, Book 4, p. 305; United States v. Cox, supra, at 188. It would follow that the Rules do not contemplate that an indictment may be "found" where there is not a bill of indictment in existence, upon which 12 or more jurors may concur. Rule 6(f), F.R.Crim.P.

B. The Void Complaint Deprived the District Court of Jurisdiction or Alternatively Entitled Defendant To A New Preliminary Hearing Upon A Valid Complaint.

The Complaint upon which appellant was held to answer by Judge Scalley, and upon which the preliminary hearing was conducted, shows upon its face that it was void. The Complaint, which is part of the record herein, shows upon its face it was sworn to before a deputy clerk of the Court of General Sessions, and not before a judge or magistrate of that or any other court. Moreover, the printed form of the Complaint shows that this procedure was intended and not inadvertent. (See the Complaint.)

Because the Complaint was not sworn to before a magistrate, defendant moved to dismiss the indictment or in the alternative for an order for requiring a new preliminary hearing upon a valid complaint. (Motion to Dismiss Indictment, pp. 1-2.) The motion was denied in an oral ruling, without opinion. (Dec. 8 Tr. S 28.) The contention was renewed upon Motion in Arrest of

Judgment, and denied upon the authority of the prior ruling. (Order and opinion denying defendant's post-trial motions, p. 2.)

Failure to have the complaint sworn to before a committing magistrate is a violation of the express terms of Rule 3 of the Federal Rules of Criminal Procedure. Rule 3 provides:

> "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 3 is made applicable to complaints filed in the Court of General Sessions by the provision of Rule 54(a) (2), F.R.Crim.P.:

> "The rules applicable to criminal proceedings before commissioners apply to similar proceedings before judges of the United States or of the District of Columbia."

The Advisory Committee Note to Rule 54(a) (2) points out:

> "In the District of Columbia judges of the Municipal Court have authority to issue warrants and conduct proceedings as committing magistrates, D.C. Code 1940, Title 11, secs. 602, 755. These proceedings are governed by these rules."

Five years ago Judge Pine held that Rule 3 of the Federal Rules of Criminal Procedure was violated by the procedure then followed in the Municipal Court (now the Court of General Sessions) whereby the complainant swore to a felony complaint before a deputy clerk instead of a judicial officer. United States v. Crosby, Criminal No. 89-61 (D.D.C.). Judge Pine's ruling is not reported, but is cited in Shadoan, Law and Tactics in Federal Criminal Cases, 71, n. 166 (1964).[1/]

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[1/] Judge Pine's ruling was also described in the Washington Post of March 14, 1963, p. B-9.

It appears that the Government's response to Judge Pine's ruling was to alter its printed form of Complaint, so as to have the complainant take the oath before a magistrate, only in those instances where a warrant of arrest was being sought upon the Complaint pursuant to Rule 4, F.R.Crim.P. (See the printed form of Complaint herein.) In those instances the Government apparently wished to avoid the consequence, which it had suffered in Crosby, of suppression of the evidentiary fruits of an arrest made under a warrant issued on a void complaint. However, the Government apparently did not see fit to alter the procedure in swearing to complaints where no warrant was being sought, and hence no loss of evidence would be entailed by the defective procedure. It is plain, however, that Rule 3 requires the same procedure of swearing to the Complaint before a committing magistrate whether or not the complaint is subsequently used to obtain a warrant pursuant to Rule 4.

Appellant submits that this Court, in the exercise of its supervisory powers over the administration of justice in the District of Columbia, should insure an effective remedy for the persistent and apparently deliberate non-compliance with Rule 3 in the issuance of felony complaints in the Court of General Sessions. The remedy timely sought below was dismissal of the indictment, or alternatively an order that a new and valid complaint be filed upon which a new preliminary hearing would be held. (Motion to Dismiss Indictment, pp. 1-2.)

At the hearing below, the Government did not argue that it had complied with Rule 3. Rather, the Government's argument treated the non-compliance with Rule 3 as a "technical defect" which did not taint the indictment. (Dec. 8 Tr. S 17-19.) The Government concluded its argument on this point:

> "For those reasons, the Government would submit that the void complaint, while perhaps an administrative matter which should be corrected in the Court of General Sessions and a matter which perhaps our office should take up with Chief Judge Greene to insure that Rule 3 is complied with literally, certainly in this case did not in any way prejudice the defendant, either of the two defendants who have subsequently been indicted on the charge of grand larceny." (Dec. 8 Tr. S 19.)

Notwithstanding the Assistant United States Attorney's acknowledgment that this is "a matter which perhaps our office should take up . . . to insure that Rule 3 is complied with literally", it appears that the policy of non-compliance with Rule 3 will continue unless and until this Court holds that deliberate non-compliance is not damnum absque injuria. The above-quoted remark was made at a hearing on December 8, 1967. Some four months later, not only was the practice still unchanged, but Rule 3 was violated on the largest scale ever in the handling of hundreds of civil disturbance cases. See Goldfarb, The Administration of Justice in Washington, D.C. during the Disorder of April 1968 (Stern Family Fund) at pp. 22-24 (recounting how one Private Mulligan signed hundreds of complaints, of which

he had no personal knowledge, without ever going before a judge of the Court of General Sessions; apparently he swore to these complaints before a deputy clerk).

The most effective deterrent to deliberate disregard of Rule 3, appellant submits, would be a holding that the void complaint renders void the subsequent order holding the defendant to answer in the District Court and therefore voids the proceedings consequent upon such order, including the return of the indictment. Under that rationale, the defendant would be entitled to dismissal of the indictment upon his timely motion to dismiss pursuant to Rule 12, F.R.Crim.P. Alternatively, if this Court considers the remedy of dismissal too drastic, at least the Government should be required, upon timely pretrial motion, to file a valid complaint upon which a preliminary hearing would be held. In this situation, as under Blue v. United States, 119 U.S.App.D.C. 315, 321 and n. 7, 342 F.2d 894, 900 (1964), the district court could appropriately direct that the defendant be released unless the pre-indictment proceedings were reconducted properly.

Blue makes clear that the Government can no longer escape review of timely challenged inadequacies in pre-indictment proceedings on the theory that the indictment moots any error at the pre-indictment stage.

> "The Government suggests to us that, even if the pre-trial proceedings before the Commissioner in this case were inadequate, the subsequent return of an indictment cured any inadequacy. We do not believe, however, that the mere existence of an indictment renders academic any defects in the Commissioner's proceedings or necessarily insulates those defects from judicial correction." Blue v. United States, supra, 119 U.S.App.D.C. at 320, 342 F.2d at 899.

The similar suggestion made by the Government below should be rejected here.

II. THE DISTRICT COURT ERRONEOUSLY DENIED THE PRETRIAL MOTION TO SUPPRESS AND THE RENEWED MOTION TO SUPPRESS.

(Record References: Motion for Suppression of Evidence; Motion for New Trial, pp. 3-4; Order and opinion denying post-trial motions, p. 7; Dec. 8 Tr. 16-17, S 30-33.)

A. The Pre-trial Motion To Suppress Should Have Been Granted On The Ground That A "Special Policeman" Does Not Have The Same Powers Of Arrest As A Member Of The Metropolitan Police Force.

Defendant prior to trial moved to suppress the evidence seized from him at the time of his arrest by Special Officer Peace. Defendant contended that the arrest was made without probable cause to believe that defendant had committed a felony, and that a special police officer had no greater power than a private citizen to arrest or search. (Motion for Suppression of Evidence and supporting Points and Authorities.)

Following an evidentiary hearing, the court below orally denied the Motion for Suppression of Evidence. The ruling was apparently based upon a finding that Special Officer Peace's observations gave him probable cause to arrest defendant for a misdemeanor committed in his presence. (See Dec. 8 Tr. S 30-33.) Peace had no probable cause to arrest for a felony, since Peace admitted, in response to a question from the Assistant United States Attorney, that prior to arresting defendant he had not formed any conclusions as to whether the value of the coats which he allegedly saw taken would exceed $100. (Dec. 8 Tr. 16-17.) The other special police officer who participated in defendant's apprehension, one Harry Wood, concededly had not observed defendant take anything. (Dec. 8 Tr. 10-13.)

Appellant submits that Special Officer Peace had no greater powers of arrest than any private citizen. A private citizen may lawfully arrest for a felony, but only if the felony has in fact been committed and the citizen has probable cause to believe that the person arrested committed such felony. Shettel v. United States, 72 App.D.C. 250, 251, 113 F.2d 34, 35 (1940); Davis v. United States, 16 App.D.C. 442, 454-56 (1900). Since Peace did not have such probable cause to arrest for a felony, the arrest was invalid if Peace's powers of arrest were limited to those of a private citizen.

Moreover, even where a private citizen makes a valid arrest, there appears to be no authority in this jurisdiction that the citizen may conduct a search or seizure incident to such arrest. The general rule in this jurisdiction is that " . . . when an officer makes a lawful arrest, even without a warrant, he may search the person of the accused for instruments, fruits and evidence of the crime." Shettel v. United States, supra, at 251, 113 F.2d at 35 (emphasis supplied; footnote omitted). The statement of this rule does not extend the power of search to a private citizen.

On the other hand, if Special Officer Peace had the same powers of arrest as members of the Metropolitan Police Force, then he could validly arrest defendant on the basis of probable cause

to believe that he had committed the misdemeanor of petty larceny.[1]

23 D.C. Code §306(c) provides:

> "Arrests without a warrant, and searches of the person and seizures pursuant thereto, may be made for violation of section 22-2202 (petit larceny), by police officers, as in the case of a felony, upon probable cause that the person arrested has in his possession at the time of the arrest, property taken in violation of that section".

Appellant contends that Congress has not conferred upon a privately employed "special policeman" any statutory powers of arrest. See 4 D.C. Code §115, which governs the appointment of "special policemen", but is silent as to any powers of arrest or search. Appellant's contention is, however, contrary to the single reported decision on the point in this jurisdiction, Singleton v. United States, 225 A. 2d 315 (D.C.App. 1967). In Singleton the court noted: "The law regarding the status of special policemen is sparse". Id. at 316. But the court relied upon dictum in National Labor Relations Board v. Jones & Laughlin Steel Corp., 331 U.S. 416, 429 (1947), which noted that it was a common practice in this country for private watchmen to be vested with powers of policemen.

The holding in Jones & Laughlin, however, was that the police powers of plant guards did not divest them of their status

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[1] A private citizen may not arrest for a misdemeanor unless it is committed in his presence and involves a breach of the peace. See Singleton v. United States, 225 A. 2d 315, 316 and n. 3 (D.C.App. 1967). Appellant contends that petty larceny should not be held a "misdemeanor involving a breach of the peace," but the point is left open by Singleton. Id. at 317, n. 4.

of private employees for purposes of collective bargaining under the National Labor Relations Act. More important, the legal powers of the guards involved in Jones & Laughlin were defined by local Cleveland ordinance, which made them members of the Municipal Police Force exercising the powers of special police officers. See id. at 430. Similarly, in the other Federal decision relied upon in Singleton, namely Barnard v. Wabash R.R., 208 F.2d 489 (8th Cir. 1953), in determining the arrest powers of a railroad watchman commissioned by the Board of Police Commissioners of St. Louis, the Court looked to the applicable Missouri law and to the oath of the private officer to "obey all lawful orders of the Board of Police Commissioners, the Chief of Police or any other officer placed in authority over me." Id. at 493-94.

Here, too, as in Cleveland and St. Louis, the arrest powers of privately employed "special policemen" should depend upon decision of the local legislature. Appellant submits that, in making the policy choice that it was desirable for "special policemen" to have arrest powers to protect the property of stores (see 225 A. 2d at 317), the District of Columbia Court of Appeals was making a policy choice that should have been made by Congress -- or now perhaps by the City Council. Strong countervailing arguments can be made that the abuse or apparent abuse of arrest power poses too great a risk of civil disturbance for the community to entrust such powers to untrained or self-trained personnel. Special Officer Peace acknowledged that no qualifying examination was required to obtain his special police commission, and that he had no training prior to joining Woodward & Lothrop, who trained

him in accordance with their own policies. (Dec. 8 Tr. 4.)

Appellant does not contend that this Court should undertake to resolve the conflicting policy considerations in a manner opposite to that of the District of Columbia Court of Appeals. Rather, appellant's contention is that the policy choice should be held a legislative one, and that in the absence of legislatively conferred arrest powers, this Court should hold that Special Officer Peace could not validly arrest defendant on July 7, 1967 for petty larceny. In that event, the pretrial motion to suppress should have been granted, and its denial was reversible error.

B. The Renewed Motion To Suppress Should Not Have Been Denied Without Findings Of Fact.

Accepting arguendo the correctness of the denial of the pretrial motion to suppress, appellant contends that the trial court should have reconsidered its pre-trial findings of probable cause on the basis of further testimony in the trial record. The pretrial motion was unsuccessfully renewed at the conclusion of the Government's case (Tr. 122-23), at the conclusion of all the evidence (Tr. 174), and upon motion for new trial (Motions for Judgment of Acquittal or Arrest of Judgment or New Trial, pp. 3-4.)

This Court has held that the final determination upon a motion to suppress should be made upon the full record including the testimony at trial. Masiello v. United States, 113 U.S.App.D.C. 32, 304 F.2d 399 (1962). Accord: DiBella v. United States,

369 U.S. 121, 129 and n. 9 (1962). In order to make this determination, defendant contended, the Court should make findings of fact on the basis of the full trial record as to what Special Officer Peace had or had not observed prior to arresting defendant. But the Court in denying defendant's motion for new trial, rejected this request:

> "Defendants have also asked for findings of fact supporting the probable cause for their arrest. The record is replete with probable cause, and there is no need to recopy the record in this order." (Order and opinion denying post-trial motions, p. 7.)

The difficulty with this approach is that the evidence in the record was contradictory. As appears from the Statement of the Case, supra, Peace's direct testimony as to his observations was in conflict with the subsequent testimony of Krauss, of Thomas, and of Peace himself on rebuttal. At the least this raised serious questions about the accuracy of Peace's direct testimony and his similar testimony supporting a finding of probable cause on the pre-trial motion to suppress.

At one point the court ruled that an instruction upon the inference from possession of recently stolen property was appropriate because "the jury may disregard" the "strongly attacked" testimony of Peace as to the taking of the clothes from the rack and picking them up from the floor. (Tr. 190.) The court as the trier of fact upon the motion to suppress could likewise disregard some or all of that evidence. Under these circumstances express findings of fact were needed to show which, if any, of Peace's

alleged pre-arrest observations the court found were proven upon the complete evidence in the record; and to permit review of such findings by this court. Absent findings of fact to show probable cause for Peace to arrest defendant, appellant submits that it was error to deny the renewed motion to suppress.

III. THE COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR NEW TRIAL.

(Record references: Motion for New Trial; Order and opinion denying post-trial motions; Tr. 15-17, 190-91.)

A. The District Court Could Not Properly Determine That Denial Of Grand Jury Minutes Was Not Prejudicial Without The Court Or Counsel Having Seen The Minutes.

At the close of the direct examination of the Government's principal witness, Peace, defendant moved for production of his grand jury minutes under the rule of Dennis v. United States, 384 U.S. 855 (1966). (Tr. 38-39.)[1/] The Court directed the prosecutor to furnish the minutes if he could obtain them by the next morning. (Tr. 41-42.) A similar request with respect to the grand jury minutes of the witness Krauss was acted upon in like manner. (Tr. 44-45.) The following morning the prosecutor advised the Court that the contract reporter was busy transcribing testimony in another grand jury investigation and that the grand jury minutes therefore could not be furnished at that time. (Tr. 48-49.)

In moving for a new trial, defendant renewed his request that the Court order the grand jury minutes transcribed, for purposes of a hearing upon the new trial motion. (Motion For Judgment of Acquittal, or Arrest of Judgment, or New Trial, p. 3.) Without acting upon this request, the Court denied this aspect of the new trial motion on grounds of lack of prejudice. (Order and opinion denying post-trial motions, pp. 6-7.)

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[1/] This was shortly prior to this Court's adoption of the Dennis rule in Allen v. United States, 390 F.2d 476 (Jan. 25, 1968).

Appellant submits that it was plainly error to hold denial of grand jury minutes non-prejudicial without knowing what those minutes contained. Likewise, it was error to make a finding of lack of prejudice without giving counsel access to the minutes to enable him to urge inconsistencies between the grand jury and trial testimony. The opinion below discussed (at p. 7) this Court's recent decision in Allen v. United States, ___U.S.App.D.C.___, 390 F.2d 476 (1968), but did not accord the hearing on prejudice which Allen warrants. In Allen, in remanding for a hearing on prejudice, this Court directed:

> "At the hearing the court will itself inspect the officer's grand jury testimony, and of course, will allow the appellant to do the same. If it develops that due to inconsistencies there is a reasonable possibility that the statement could have been effectively utilized by the defense, a new trial should be had." 390 F.2d at 482.

Appellant should be accorded like relief here.

B. The Court Erroneously Held That A New Trial Was Not Warranted By The Prosecutor's Opening And Closing Statements As To Evidence Which Was Never Introduced.

In outlining the Government's anticipated proof in his opening statement, the prosecutor stated that Officer Peace

> "will testify that at the time he arrested the defendants they did not have a sales slip in their pocket, nor did they have any money in their pockets.
>
> Special Officer Krauss will also testify to essentially the same thing since he was there and observed essentially what Special Officer Peace observed." (Tr. 11.)

In recounting Peace's testimony in his summation, the prosecutor similarly stated:

> "He also testified, ladies and gentlemen, that he arrested, searched the defendant Gaither and found no sales slip and found no money." (Tr. 190; Arg. Counsel Tr. 5.)

Defense counsel objected that there was no such testimony in the record, and the Court thereupon advised the jury:

> "of course, the jury makes the ultimate determination whether that is in evidence, whether that is a fact. If it is not in evidence in accordance with your recollection of the testimony, you will disregard the observation of counsel." (Tr. 191; Arg. Counsel Tr. 5-6.)

In defendant's summation, counsel asserted that Peace had not given the testimony which the prosecutor recalled. (Arg. Counsel Tr. 24.) The jury was thus left to decide between the conflicting recollections of counsel.

In connection with his motion for new trial, defendant moved "that there be transcribed at the expense of the Government whatever portion of the trial testimony the Government may contend contains testimony that defendant Gaither had no money or sales slip upon his person at the time of his arrest." (Motion for Judgment of Acquittal, or Arrest of Judgment, or New Trial, p. 3.) This request was not granted prior to the Court's rendering of its Order and opinion denying the motion for new trial. In its opinion the Court concluded "that any possible prejudice to defendants from this remark [by the prosecutor in summation] does not approach that which would require a new trial." (Order and opinion denying post-trial motions, p. 6.) However, in reaching this conclusion the Court was without benefit of a transcript that would enable it to determine whether or not the prosecutor's

remark was unsupported by the record. Nor did the Court's opinion undertake to decide this from memory. (See id. at pp. 2-6.)

Now that the trial record has been transcribed (see especially Tr. 15-17), it is apparent that defendant was correct in his contention that Peace had not given the testimony cited to the jury in the prosecutor's opening and closing arguments. Accordingly, appellant urges that he is entitled to reversal.

No case has been found in this jurisdiction in which the prosecutor, both in his opening statement and in his summation, made the same erroneous statement not supported by the testimony which was in fact introduced at trial. The rule applicable in this situation may be derived from the combination of the decisions in Allen v. United States, 106 U.S. App.D.C. 350, 273 F.2d 85 (1959) and Jones v. United States, 119 U.S. App.D.C. 213, 338 F.2d 553 (1964).

In Allen, the unintroduced testimony was mentioned by the prosecutor only in his opening statement. The majority of the court of appeals panel, holding that the statement did not constitute reversible error, held: "Ordinarily, a prosecuting attorney's failure to prove an assertion he made in his opening statement is prejudicial to the Government, not the defendant." 106 U.S. App.D.C. at 351. The majority opinion assumed, without

deciding, that an unproven opening averment could constitute prejucial error, but held: "[T]here was no prejudice to the appellant here, for he chose to be a witness at his trial and testified at length." The majority also observed that the prosecutor's unsupported assertion in his opening statement was unlikely to have influenced the jury's deliberations three days later. The dissenting opinion took the position that the prosecutor's erroneous statement in his opening did constitute reversible error.

In the instant case, in contrast to Allen, the prosecuting attorney's failure to prove an assertion he made in his opening statement was not "prejudicial to the Government" because the jury may well have believed from the prosecutor's summation that the prosecutor had proved the assertion. The repetition of the assertion in the prosecutor's summation was the same morning that the jury retired to deliberate, not three days previously as in Allen. And here, unlike Allen, the appellant did not choose to testify at his trial. (Tr. 120.)

In Jones v. United States, supra, the prosecutor likewise made an assertion in her opening statement which the subsequent proof did not bear out. The averment in the opening statement, as to what a certain witness had observed, was in effect repeated

by the prosecutor in her questions to the witness whom she expected to give the testimony in question. The witness, however, in his answers denied the prosecutor's assertion, and the Court instructed the jury to disregard one of the questions embodying the prosecutor's assertion. Notwithstanding the Court's instruction and the witness' denial of the prosecutor's erroneous assertion, the Court of Appeals held that the erroneous assertion made in the opening statement and reiterated in the prosecutor's questions constituted reversible error.

Thus in Jones, where the unsupported opening averment was reiterated by the prosecutor -- in contrast to Allen where the erroneous opening assertion was not reiterated -- the prosecutor's erroneous assertion was held to constitute reversible error. In the instant case, like Jones but unlike Allen, the erroneous assertion in the opening was reiterated. That the reiteration here was in summation, rather than in questioning by the prosecutor, certainly does not make the instant case weaker than Jones. On the contrary, the instant case appears stronger because the reiteration was in summation, so that its effect was not dispelled by the witness' denial or by the Court's instruction as in Jones.

The general rule limiting summations to assertions supported by the record is well established:

> "It is well settled that the jury's consideration in a case should be limited to those matters actually brought out in evidence and that summation should not be used to put before the jury facts not actually presented in evidence. This doctrine is especially important in criminal trials: the prosecutor represents 'a sovereignty whose obligation is to govern impartially.' Berger v. United States, 295 U.S. 78,88,55 S.Ct. 629,633, 79 L.Ed. 1314. As Berger suggests, this obligation may cause a jury to place more confidence in the word of a United States Attorney than in that of an ordinary member of the Bar." United States v. Spangelet, 258 F.2d 338, 342 (2d Cir. 1958).

This rule has been applied in this jurisdiction. See, e.g., King v. United States, 372 F.2d 383 (D.C.Cir. 1967) (reversing conviction because of prosecutor's erroneous assertion in questions and in summation that there was no evidence of organic brain damage of defendant); Stewart v. United States, 101 U.S. App.D.C. 51, 247 F.2d 42 (1957) (reversing conviction because prosecutor's statement in summation was not based on the evidence); Corley v. United States, 124 U.S. App.D.C. 351, 365 F.2d 884 (1966) (reversing conviction because of an erroneous statement by the prosecutor in summation as to what certain alibi testimony had been). In each of these cases the prosecutor's erroneous statement was made in good faith, as of course it was in the instant case. In each of these cases, moreover, this Court felt compelled to notice the point even though it had not been raised by counsel on appeal.

In Corley v. United States, supra, Judge Berger dissented from reversal of the conviction, partly on the ground of absence of objection at trial.

> "That the government's misstatement was one of fact and was inadvertent makes absence of an objection from the defense especially relevant. Since the error was in recital of facts which the jury had heard from witnesses, a timely objection by the defense would have enabled the prosecutor or the court to correct and remove any prejudicial effect the argument may have had on the jury. Inadvertent errors in arguments to the jury, such as those made by both sides here, are inevitable in the course of most trials; appellate courts ought not reverse whenever such an error occurs, particularly when the error was not sufficient to call forth an objection." 124 U.S. App.D.C. at 354 (dissenting opinion).

Here, by contrast, the misstatement of fact in summation did call forth an immediate objection from the defense. (Tr. 190-91.) Appellant submits that the Court's ruling that the jury's recollection controls was not sufficient to dispel the prejudice from the erroneous statement in summation.

> "We cannot agree with the Government that the prejudicial effect of such misquoting [by the prosecutor of a witness' testimony] was removed by the United States Attorney and the trial judge telling the jurors that it was for them to recall the actual statement. Stewart v. United States, 1957, 101 U.S. App.D.C. 51, 247 F.2d 42, 47." Wallace v. United States, 281 F.2d 656, 667 (4th Cir. 1960).

Finally, the prejudicial effect from the prosecutor's asscertion of the unintroducted testimony was heightened here by the granting of the Government's request for an instruction allowing defendant's guilt to be inferred from the unexplained possession of recently stolen property. The requested instruction (Tr. 219) granted over the objections of the defense (Tr. 133-35, 188-90) put the onus upon defendant to attempt an explanation for possession of the jackets. (See Arg. Counsel Tr. 24-25.) If the jury believed the prosecutor's erroneous statement that the evidence showed that defendant had no money in his possession, then it was unlikely that the jury would deem the possession "satisfactorily explained" (Tr. 219.)[1/]

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1/ The instruction is particularly damaging where the defendant does not testify. See Gordon v. United States, 127 U.S.App.D.C. 343, 348, n. 11, 383 F.2d 936, 941 (1967).

IV. THE DEFENDANT WAS ENTITLED TO JUDGMENT OF ACQUITTAL BECAUSE UNCONTROVERTED DEFENSE EVIDENCE AND REBUTTAL EVIDENCE ESTABLISHED THE IMPOSSIBILITY OF THE EYEWITNESS TESTIMONY RELIED UPON BY THE PROSECUTION.

(Record References: Def. Ex. 4; Motion for Judgment of Acquittal; Tr. 136-38, 143, 171-73.)

A defendant is entitled to judgment of acquittal at the conclusion of all the evidence, or upon his post-verdict motion therefor, if a reasonable juror could not have found him guilty beyond a reasonable doubt. Curley v. United States, 81 U.S.App. 389, 160 F.2d 229 (1947). The rule in Curley was laid down in a case where the defendant had rested upon the Government's case. Appellant submits that, where uncontroverted defense testimony and rebuttal testimony is included in the record, this too must be considered by the trial court in passing upon the motion for judgment of acquittal.

Recently, applying the Curley test, and adopting it in preference to the less stringent test favored by Judge Learned Hand, Judge Weinstein of the United States District Court for the Eastern District of New York, predicated a judgment of acquittal in part upon "uncontested testimony" of a defense witness (and did so even though such testimony was hearsay). United States v. Melillo, 2 CrL 3039 (E.D.N.Y., November 1, 1967). Appellant respectfully submits that this is the proper means of applying the Curley test to a motion for judgment of acquittal at the conclusion of all the evidence, and that it should be applied to

the "uncontested testimony" herein.

The evidence, including the conflicts between Peace and Krauss, has already been summarized at length in the Statement of the Case. The crucial prosecution testimony was Peace's eye-witness account of the entire theft, which if believed was sufficient to convict. Appellant contends that Peace's own rebuttal testimony, relating to the diagram of the store introduced in the defense case (Def. Ex. 4), as a matter of law rendered Peace's account of Gaither's receiving the coats not believable beyond a reasonable doubt.

Appellant respectfully requests that the Court examine Def. Ex. 4, as marked by Peace. Defendant's Exhibit 4, a diagram of the second floor of Woodward & Lothrop as it was arranged on June 23, 1967, was admitted pursuant to stipulation between the parties (Tr. 143) and must be regarded as uncontroverted defense evidence. From Peace's own markings on the diagram, it appears impossible that he could have seen the jackets resting on the floor at point "Y" (Tr. 173) from where he allegedly stood at point "O" (Tr. 172). Peace's attempted explanation, that the diagram did not after all show the store as it was on July 7 (Tr. 173), seems insufficient to dispel a reasonable doubt -- especially in light of Thomas' uncontroverted testimony that the built-in pants table was a fixture both before and after July 7. (Tr. 137-38.)

Under these circumstances, appellant respectfully submits, while the evidence may have been sufficient to go to the jury in a civil case for conversion of the coats, it was not evidence from which a reasonable juror could find guilt beyond a reasonable doubt. Alternatively, if the evidence contradicting crucial eye-witness testimony of Peace is not held to require a judgment of acquittal, than the alternative relief of a new trial should have been granted. (Motion for Judgment of Acquittal, or Arrest of Judgment, or New Trial, p. 4.)

## CONCLUSION

For the foregoing reasons, appellant Gaither respectfully prays that the judgments in Nos. 21,780 and 22,148 be reversed, and further prays that the case be remanded with directions to dismiss the indictment. In the alternative, if all other relief is denied, appellant prays that the case be remanded for a hearing upon whether denial of access to the grand jury minutes of the witnesses Peace and Krauss was prejudicial.

ROBERT L. WEINBERG
Counsel for Appellant Gaither
(Appointed by this Court)

1000 Hill Building
Washington, D. C. 20006

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 21,780 & 22,148

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TYRONE GAITHER, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

No. 21,864

---

CHARLES TATUM, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

Appeal from the United States District Court
for the District of Columbia



DAVID G. BRESS,
*United States Attorney.*

FRANK Q. NEBEKER,
ROGER E. ZUCKERMAN,
*Assistant United States Attorneys.*

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## ISSUES PRESENTED *

In the opinion of the Government, the following issues are presented:

1) Was appellant Gaither's arrest by Special Police Officer Leonard Peace lawful?

2) Were appellants' challenges to the procedure by which their complaint was sworn to below timely, coming as they did only after indictment? If so, was the felony complaint insufficient where the complainant after appellants' warrantless arrest swore to its verity before a deputy clerk of the Court of General Sessions? And if so, were appellants thereafter in any way impaired by that procedure?

3) May appellants challenge the procedures by which their indictment was secured in the absence of any proffered irregularity in that procedure or variance in the filed indictment? If so, was the grand jury when it voted probable cause to believe appellants the perpetrators of the grand larceny at issue required to do so only upon a written draft before it? If not, was the foreman's signed verification of the written draft thereafter prepared sufficient authentication of the grand jury's voted charge?

4) In the face of a tardy request for grand jury minutes, was the trial court bound to peruse the minutes once prepared to determine prejudice to appellant Gaither by their absence during trial? If so, did appellant Gaither sustain reversible error by the court's failure to do so?

5) Did the trial court properly continue the trial in the face of appellant Tatum's repeated tardiness and absences?

6) Did appellant Gaither sustain prejudice of a degree requiring reversal by the prosecutor's remarks concerning the absence of any money or sales slips on appellant Gaither's person when arrested?

7) Was the evidence sufficient to sustain appellant Gaither's conviction?

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* This case has not previously been before this Court.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 21,780 & No. 22,148

---

TYRONE GAITHER, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

No. 21,864

---

CHARLES TATUM, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

**Appeal from the United States District Court for the District of Columbia**

---

**BRIEF FOR APPELLEE**

---

## COUNTERSTATEMENT OF THE CASE

By indictment filed August 30, 1967, appellants Tatum and Gaither were charged jointly in a single count with grand larceny.[1] After a joint trial before United States District Court Judge Oliver Gasch and a jury on December 19-21, appellants were found guilty as charged. Appellant Tatum was sentenced to a term of imprisonment from two to six years. Appellant Gaither was sentenced under the Narcotics Addict Rehabilitation Act, 18 U.S.C. § 4253, to a term of imprisonment not to exceed ten years. Below, the following transpired.[2]

### The Pre-Trial Hearing

On December 8, 1967, appellants moved for suppression of certain evidence on grounds of illegal arrest and for dismissal of their indictments on grounds of asserted defects in the process by which complaints and indictments against them were procured.[3] Appellant Gaither was present at the hearing and represented by counsel. Appellant Tatum, on bond, was absent. After discussion of his absence with appellant Tatum's counsel, himself present at the hearing, Judge Gasch determined to go forward and commenced the hearing (H. Tr. S-1, S-2).

During lengthy argument at the bench, appellants urged dismissal of their indictments on the following grounds: The Fifth Amnedment and the Federal Rules of Criminal Procedure required the grand jury when it voted to indict to do so on existing written indictments before it or alternatively that such written indictments once prepared be ratified by the grand jury prior to their filing in open court, procedures assertedly not followed below (H. Tr.

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[1] In violation of 22 D.C. Code § 2201.

[2] The following citations are used: "H. Tr." refers to the December 8 suppression hearing; "Tr." refers to trial; "A. Tr." refers to argument transcript of December 21.

[3] Motions by appellants for discovery and for bills of particulars were disposed of by stipulation and a consent order (H. Tr. S-2).

S-3—S-8); the complaint filed following their arrest was not sworn to before the proper judicial officer (H. Tr. S-8—S-12); and the indictments charging them with grand larceny improperly styled the required felonious taking with the word "stole" (H. Tr. S-12—S-13). After lengthy response by the Government (H. Tr. S-13—S-23) and rebuttal (S-23—S-28), Judge Gasch denied appellants' motion to dismiss their indictments (H. Tr. S-28).

The following evidence was then adduced relating to appellants' motion to suppress. Leonard Peace, a special police officer for Woodward and Lothrops Department Store, first testified. Special Officer Peace had been employed by Woodward and Lothrops in that capacity for some two years. He had received a commission from the Metropolitan Police Department as a special police officer in 1966. To qualify, he was given training by the Department Store in their policies relating to merchandise control and employee protection. At the time he was commissioned, Special Officer Peace received an outline of his powers and duties from the Metropolitan Police Department. Among powers and duties he recalled was an authorization to "apprehend anyone that is abusing an employee [or] taking merchandise without permission from the property of Woodward and Lothrop". (H. Tr. 3, 4, 55.)[4]

On July 7, 1967, Special Officer Peace was patrolling the second floor Men's Department. As he stood near the underwear section he noticed appellants standing about fifty feet away. He scrutinized them carefully, in part because but three days earlier appellant Gaither and appellant Tatum "came up and literally filled a shopping bag full of trousers and left the store". (H. Tr. 6.) Afraid then to intercede by himself, Special Officer Peace had attempted to retrieve the merchandise by following Tatum and Gaither "to let them know [he] was there" (H. Tr. 7). Appellant Tatum on having seen Peace following him had

[4] The instructions given special police officers by the Metropolitan Police Department were made a part of the record (H. Tr. 5). They are now before this Court as is a sample commission.

blocked the officer to allow Gaither to flee the area (H. Tr. 7).

Remembering this earlier incident, Special Officer Peace watched as appellant Tatum left the escalator and walked to the men's accessory counter. After looking in all directions Tatum approached the sport coat section. At this juncture, appellant Gaither appeared carrying a Kresge's shopping bag. The officer with unobstructed view saw Gaither wait at the shirt counter a short distance away as Tatum took sport coats from the rack and put them on the floor. After perhaps thirty seconds, Gaither approached with open shopping bag. Tatum rolled the coats into manageable size and stuffed them into the shopping bag held by Gaither.[3] As soon as the coats were placed in the bag, Gaither quickly left the area and headed for the down escalator. (H. Tr. 7, 8, 9.)

Officer Peace and two other security officers approached appellant Gaither. Peace informed him he was under arrest for shoplifting the jackets in the bag he carried. He then took the bag from him. (H. Tr. 10-12.) Officer Peace also checked appellant Gaither's wallet and found it empty (H. Tr. 17).

Special Police Officer George Krauss, also employed by Woodward and Lothrops Department Store, then testified. Officer Krauss at the time of trial had served as a special police officer in the Washington area for the previous four years. Upon beginning work for Woodward and Lothrops early in 1967, Mr. Krauss received a new commission upon which were stated his powers and duties. (H. Tr. 18, 19, 20.) As Officer Peace, Officer Krauss had observed appellants in Woodward and Lothrops prior to July 7, 1967. On that day Special Officer Krauss heard the security alarm, three bells. He contacted the operator who informed him that Special Officer Peace was on the second floor Men's Department and needed assistance. (H. Tr. 20, 21.)

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[3] Officer Peace observed that at least three sport coats were stuffed into the bag and at trial estimated the value of each to be something between $45 and $125 (H. Tr. 16).

On reaching the second floor, Krauss headed toward Officer Peace. Going toward him, he passed appellant Gaither standing near the shirt counter with a shopping bag. Officer Peace then directed Officer Krauss' attention to the sport coat section where Krauss saw Tatum standing with several sport coats at his feet. The coats still had hangers in them. (H. Tr. 22, 23.) Gaither then proceeded to the sport coat section and opened the bag he held for Tatum. Officer Krauss' view was partly obstructed by a clothing rack. Unable to see precisely what then transpired, Officer Krauss did see "the coats coming up off the floor and . . . movement of shoulders from Mr. Tatum and Mr. Gaither." (H. Tr. 22, 23.)

Officer Krauss watched as Gaither, shopping bag in hand, left the area and headed toward the escalator. He was there apprehended by Officer Peace. Krauss remained behind to keep Tatum under surveillance and after identifying himself as a security officer effected Tatum's arrest as he left the sport coat section (H. Tr. 26, 27). Both were thereafter turned over to the Metropolitan Police Department (H. Tr. 30).

After argument, the Court denied appellants' motion to suppress the items seized from appellant Gaither (H. Tr. S-33).

**The Trial**

At trial, the Government opened with the testimony of Special Officer Peace who reiterated the substance of testimony earlier given at the pre-trial suppression hearing. At approximately 12:10 p.m. July 7, 1967, he was patrolling the second floor of the main building of Woodward and Lothrops Department Store, where he worked as a security guard. He observed appellant Tatum leave the up escalator and head toward the men's accessory bar. After a glance around the floor, appellant Tatum went toward the sport coat section and began selecting sports jackets from the rack and laying them on the floor. Appellant Gaither appeared shortly thereafter and held open a big shopping bag into which appellant Tatum shoved the

sports coat. (Tr. 15, 16, 17.)[6] Special Officer Peace identified the five sport coats marked Government's Exhibits 2-6 as those taken by appellants on the day in question and as belonging to Woodward and Lothrops Department Store (Tr. 18, 19).

During these events, Peace was some fifty feet from appellants and had an unobstructed view (Tr. 21, 22). He unhesitatingly identified appellants as the two individuals involved in the theft (Tr. 22).[7] Special Officer Peace testified that prior to the day in question he had seen appellant Tatum in the Men's Sportswear Department of Woodward and Lothrops with a large Drug Fair bag into which he shoved several pairs of rolled up trousers (Tr. 37). He was unsuccessful in his attempt to apprehend him (Tr. 37-39).[8]

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[6] The shopping bag was marked as Government's Exhibit Number 1 and the five coats as Exhibits 2-6.

[7] At this juncture the Government at the bench sought the use of testimony regarding the incident occurring two or three days earlier in which appellants had fled the store with a bag full of trousers in order to show "intent . . . scheme [or] design" (Tr. 23) and to corroborate Special Officer Peace's identification of appellants (Tr. 32) in expectation of a claim that his view was too obstructed to see and the identification was therein mistaken. Counsel for appellant Tatum represented to the court at this juncture that his clients defense might well be mistaken identification; counsel for appellant Gaither represented that as to him no such defense would be undertaken (Tr. 34). After weighing probative value against possible prejudice, Judge Gasch allowed testimony of the prior incident as far as it related to appellant Tatum and excluded any reference therein to appellant Gaither (Tr. 35, 36).

[8] Counsel for appellant Gaither at this point sought production of his testimony before the grand jury. In response to the question of need, counsel represented that he wished the minutes "to impeach [Officer Peace's] testimony" (Tr. 39). Counsel for each appellant did have copies of the PD 163 form as well as "grand jury notes . . . taken down by the clerk of the grand jury" just prior to Peace's testimony there (Tr. 40). Counsel for appellant Gaither represented that he first made the request immediately prior to trial that same day. Because the court reporter could not prepare the minutes given the little notice without substantially delaying the trial, counsel suggested that the trial continue and in the

During cross-examination, Special Officer Peace reiterated that he had requested aid when he first sighted Tatum coming up to the second floor. Special Officer Krauss responded and stood beside him, perhaps two or three feet away, as Peace observed Tatum stuff Gaither's shopping bag with the sport coats taken from the rack moments earlier. (Tr. 54, 55, 56.) Special Officer Peace reaffirmed his earlier testimony that the view between him and appellant Tatum during the period he removed the coats from the rack and began filling Gaither's shopping bag was unobstructed and clear (Tr. 62). Appellant Tatum stood "in front of the long rack [of sport coats] against the wall" and took jackets from "the bottom row" of a two tiered rack (Tr. 64, 67). Special Officer Peace stood some fifty feet away, the intervening area occupied solely by counters containing "formal shirts, ties, underwear" and similar items behind which Special Officer Peace had stationed himself (Tr. 68). No tall rack of clothing bisected the area between Special Officer Peace and the wall-rack on which were the sports jackets stolen by appellants (Tr. 73-74).[9] Moreover, an aisle ran outward

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event of conviction, the grand jury minutes by that time transcribed be considered by the court to determine if they "afforded any basis for a new trial". (Tr. 49.) After first determining to go ahead, the court accepted this alternative (Tr. 49).

[9] Counsel for appellant Gaither at trial relied heavily on a diagram earlier drawn during the preliminary hearing to impeach Special Officer Peace (Tr. 70-74). At trial Special Officer Peace testified that at right angles to the wall-rack where appellant Tatum was pilfering sports coats and some distance away on the adjoining wall was a similar tall rack of clothing (Tr. 66-67). The diagram contained no such marking. Trial counsel repeatedly pursued the theory that the additional rack of clothing left off the diagram bisected the line between Peace and appellant Tatum, thereby cutting off the view. Special Officer Peace in response was totally consistent that at the time of the offense his view was unobstructed by intervening racks of clothing and that only low lying counters were present in the fifty feet between him and appellant Tatum (Tr. 73, 74). Whatever other tall racks of clothing there were in the immediate area were well off to the sides (Tr. 73). Moreover, an aisle ran between Peace and appellant Tatum such that Peace was able to perceive the events at issue with a totally unobstructed view (Tr. 73).

from the area occupied by appellants to the area some fifty feet away where Special Officer Peace had concealed himself (Tr. 73, 74, 80). Accordingly, his view of the events at issue was almost totally unhindered by intervening objects (Tr. 73, 74, 80).[10]

James Revell, an assistant buyer employed by Woodward and Lothrops, testified that Government's Exhibits 2 through 6, the five sport coats, were the property of that store. Each jacket contained a peculiar style number on tags attached to its sleeves. Purchase invoices showed the following valuation: Exhibit Number 2 was purchased by Woodward and Lothrop for $20; Number 3 for $33.50; Number 4 for $24.49; Number 5 for $29.38; and Number 6 for $24.49. The total wholesale value of the five sports coats was $131.86. (Tr. 82-86.)

Special Officer Krauss then testified. Responding to a call for assistance on the second floor, Krauss joined Special Officer Peace in the Men's Department. Peace directed his attention to the sport jacket rack where Krauss saw "these sport coats laying on the floor." (Tr. 92, 93.) Krauss then "[m]oved about three feet away from [Peace] to go over by the other side near the tie racks" (Tr. 93).[11] Keeping his eyes on the sport coats on the floor, Special Officer Krauss saw appellant Tatum bend down and roll the coats up. Tatum then picked them off the floor. Krauss had a totally unobstructed view of these proceedings. (Tr. 92, 93, 107, 108.) Krauss then saw appellant Gaither open a large Kresge's shopping bag into which appellant Tatum shoved the rolled-up sport coats (Tr. 95, 96, 97).[12] Krauss testified the sport coats in question, Government's Exhibits 2 through 6, as those appellant Tatum took from the rack (Tr. 97). Special Offi-

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[10] It was stipulated at the close of Special Officer Peace's testimony that Woodward and Lothrups was an existing corporation incorporated in the District of Columbia (Tr. 81).

[11] There was no tie rack in front of Special Officer Peace (Tr. 100).

[12] At this juncture, Krauss saw appellant Gaither clearly. He could only see appellant Tatum's hands however. (Tr. 96, 97.)

cer Krauss saw appellant Gaither leave the area with the shopping bag into which the sport coats had been put. Shortly thereafter, as Special Officer Peace was in the process of apprehending Gaither, Krauss identified himself to appellant Tatum who was about to board the down escalator and placed him under arrest. (Tr. 96, 97.) Krauss unhesitatingly and positively identified both appellants as the two individuals involved in the theft (Tr. 97).

On cross-examination, Special Officer Krauss testified that appellants for a time moved behind the rack of sport coats. This interfered with his view then but was insufficient to prevent him from observing them pile the coats into the bag and determining their identity (Tr. 105, 106). As Special Officer Peace, Special Officer Krauss was consistent that no other clothing racks intervened between his vantage point and appellants; the sole furniture occupying that area was a counter on which were neckties (Tr. 112).

After introduction in evidence of Government's Exhibits 1 through 10, the Government rested. Motions for judgments of acquittal were denied (Tr. 118-119). Renewed motion for suppression was also denied (Tr. 122-123).[13]

The defense opened with the testimony of Dale R. Thomas, a part time employee of Woodward and Lothrops who had worked in the Men's Department during the month of July, 1967. Mr. Thomas testified that during that month in front on the sport coat rack was a built-in table on which were displayed pants. (Tr. 136, 137.) Mr. Thomas was not present in the store on the day in question, July 7, 1967 (Tr. 137). The table was "a low table" which one could "see over" (Tr. 139). If one stood next to the tie counter facing the sport coat rack on the wall,

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[13] Following the lunch recess of December 20, 1967, both appellants arrived late for the afternoon session. Appellant Gaither represented that he had dozed off. Appellant Tatum represented that he was not aware of the time. (Tr. 125, 126.) The court reprimanded appellant Tatum that he should be prompt in his appearances in order that he not jeopardize his bail status (Tr. 126). Appellant Tatum represented that it could not happen again (Tr. 126).

the table on which the pants were laid would not obstruct his view, except as to items on the floor directly behind the table (Tr. 140, 141). At this juncture, a diagram of the floor area of the men's department as of June 23, 1967, was admitted in evidence by stipulation of the parties (Tr. 143). Special Officer Peace's handwritten diagram was also admitted into evidence (Tr. 147). Appellant Gaither then rested (Tr. 171).

Cornelius Anderson, a witness on behalf of appellant Tatum, took the stand and testified that on the day in question he and Tatum had journeyed to Woodward and Lothrops to take advantage of a sale on silk shirts. After Mr. Anderson bought a shirt and a sport shirt, he saw appellant Tatum placed under arrest and charged with larceny. Mr. Anderson indicated appellant Tatum took several coats off the rack and laid them on a nearby counter with the intention of calling them to Anderson's attention as coats he might wish to purchase (Tr. 154, 155, 156, 164). Neither appellant took the stand. Appellant Tatum then rested (Tr. 171).

The Government recalled Special Officer Peace, who indicated on the diagram marked Defense Exhibit Number 4, where the theft took place and from where he observed it (Tr. 172). Special Officer Peace again testified that no intervening rack of clothing block his view of either appellant. Peace further testified that certain changes were made in the alignment of display tables between June 23, 1967, the date of the format related by the diagram, and July 7, 1967, the date of the offense (Tr. 173-174). The Government then rested.

After closing arguments and instructions, appellants were found guilty as charged. This appeal followed.

## ARGUMENT

### I. Evidence seized pursuant to appellant Gaither's arrest was properly introduced below.

(H. Tr. 16)

Appellant Gaither complains that the court below erroneously denied his motion to suppress five sport coats

and a paper bag taken from him upon his arrest by Special Office Peace. We think this contention wholly devoid of merit.

Apparently conceding that a regular police officer could properly have effected his arrest, appellant Gaither claims that Special Officer Peace was not authorized statutorily to arrest him, Congress having "not conferred upon a privately employed 'special policeman' any statutory powers of arrest" (Gaither Br. at 30). He also asserts that Special Officer Peace even acting as a private citizen could not have arrested him because Peace purportedly did not perceive the offense he witnessed to be a felony nor was it as a matter of law a misdemeanor constituting a breach of the peace. Accordingly, appellant Gaither concludes that the officer occupied a sort of legal limbo which prevented him in any way from effecting appellant's arrest when he saw him steal the several sport coats and which required instead the officer allow appellant unhindered to leave the store with his booty in tact. We think such a position is surely preposterous.

At the time of appellant's arrest, Special Officer Peace possessed a commission issued pursuant to 4 D.C. Code § 115 authorizing his appointment as a "special policeman" with commensurate powers. Section 115 authorizing the commission provides:

> The Commissioners of the District of Columbia, on application of any corporation or individual, or in their own discretion, may appoint special policemen for duty in connection with the property of, or under the charge of, such corporation or individual; said special policeman is to be paid wholly by the corporation or person on whose account their appointments are made, and to be subject to such general regulations as the said commissioners may prescribe. (Mar. 3, 1899, 30 Stat. 1057, ch. 422).[14]

[14] Those powers delegated to the commissioners are now delegated to the Mayor-Commissioner and City Council. Section 402(91) of Reorganization Plan No. 3, 1962, 32 F.R. 11669, effective November 3, 1967.

Such regulations are codified in Chapter XXXII of the *Metropolitan Police Department Manual.*[15]

Appellant Gaither contends that the statute and regulations provide a "special policeman" with no additional rights of arrest and seizure above those he possesses as a private citizen. We think this is misconceived. The essence of a commission generally is that it confers authority to private individuals to act in a public capacity.[16] In this case the public capacity is that of policeman. On duty at his place of employment and acting pursuant to the terms of his commissions and the regulations which govern it, Special Officer Peace held the office of policeman.[17] His powers otherwise limited by the commission and regulations, at all other times he was without such authority.[18] We think the difference between regular and special policeman lies in the nature of their commissions. Regular policemen whether on duty or off are always 'police officers' with requisite powers of arrest; special policemen are 'police officers' only in compliance with the terms of their commission and their powers of arrest are so limited. To this end, we think it is not without significance that the empowering statute, 4 D.C. Code § 115 speaks in terms of special "policeman" rather than guards, watchmen or the like.

Statutory commission of special policemen with requisite powers of arrest is long settled in this country. See, e.g. *National Labor Relations Board* v. *Jones Laughlin Steel Corp.*, 331 U.S. 416, 431 (1947); *Frank* v. *Wabash*

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[15] They and the entire manual were approved by the Commissioners on April 19, 1948. They are a part of the record on appeal and occupy some 15 enumerated sections.

[16] The legal definition of a commission can be found in *Black's Law Dictionary* (4th ed. 1951), and 1 *Bouvier's Law Dictionary* (Rawless ed. 1914). See Generally, *Marbury* v. *Madison*, 5 U.S. (1 Cranch ) 137 (1803); *United States* v. *Vinton*, 28 Fed Cas. 379 (No. 16, 624) (C.C.D. Me. 1836).

[17] A sample commission similar to that held by Special Officer Peace is a part of this record.

[18] See, e.g. *McKenzie* v. *United States*, 158 A.2d 912 (D.C.C.A. 1960).

*R. Co.*, 295 S.W.2d 16 (1956); accord *Barnard* v. *Wabash R. Co.*, 208 F.2d 489 (8th Cir. 1953). The ambit of the powers of arrest possessed by special policemen in this jurisdiction was squarely met by the Court of Appeals for the District of Columbia in *Singleton* v. *United States*, 225 A.2d 315 (D.C.C.A. 1967). As appellant Gaither acknowledges, the court there found sufficient authorization for special police officers operating within the limits of their commission to make arrests in a manner similar to that regular police officers might, specifically to arrest for misdemeanors as provided by 23 D.C. Code § 306.

During the course of its opinion the court in *Singleton* noted a variety of reasons for so construing the statutory scheme [19] upon which we make the following observations below. First, to construe Section 115 otherwise (and as appellant now suggests) would give special policemen "status . . . little more than private citizens". It would render the explicit congressional mandate meaningless. Second, such construction would be particularly anamolous in light of the unchallenged authority of special policemen to wear uniforms and carry weapons while on authorized duties. Third, nugatory construction of the statute there sought by appellant Singleton, and here pressed by appel-

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[19] The court stated in part:

> If, as appellant contends, special policemen have the power to arrest only for misdemeanors committed in their presence or view, their status would be little more than of private citizens, although they are authorized to wear uniforms and carry weapons. A store would then have to employ an army of special policemen to insure that every act of shoplifting was personally observed, but this is impractical. The other alternative is for sales personnel to either arrest shoplifters themselves or seek assistance from the Metropolitan Police. Neither of these solutions is desirable since the former places the salesclerk in physical danger, and the latter affords the criminal the opportunity to flee or dispose of the stolen merchandise. In short, reality dictates the necessity for allowing a salesclerk to report a shoplifting incident to a special policeman who can then arrest the suspect on probable cause. This not only ensures the safety of employees while denying the misdemeanant the opportunity to dispose of the stolen goods, but gives meaning to the statute which authorizes the use of special policemen. *Id.* at 316, 317.

lant Gaither, would yield a result whereby "[a] store would then have to employ an army of special policemen to insure that every act of shoplifting was personally observed. . ." Alternatively, sales personnel themselves would be charged with responsibilities for the defense of their person and goods in their department. And finally, nugatory construction would necessitate substantially greater reliance on the Metropolitan Police. All these results were surely unintended by the framers of the original bill, particularly the last. Passed as a part of an appropriations bill for the District of Columbia on March 3, 1899,[20] we think the statute was largely intended to limit costs of police protection to the general public by appointment of a special force with limited jurisdiction, allowing release of regular policemen to on-the-street duties. Hence, the section explicitly requires that such special policemen commissioned under it be "paid wholly" by their private employers and not out of public funds. We think these considerations in conjunction with the explicit words of the statute and regulations thereunder announced militate strongly in favor of the position taken in *Singleton*, that special police officers while on commissioned duty may arrest as would regular police officers.[21]

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[20] 30 Stat. 1057.

[21] Appellant claims the cases assertedly relied on in *Singleton* do not support the court's holding (Gaither Br. 30-31). None of course is directly in point since none deals with Section 115. The Supreme Court in *Jones Laughlin*, however, explicitly noted:

> "It is a common practice in this country for private watchmen or guards to be vested with the powers of policemen, sheriffs or peace officers to protect the private property of their employers." *Id.* at 429.

The local ordinance with which they dealt there, Section 188 of the Cleveland Municipal Code, commissioned plant guards with police powers. The court then went on to describe *in its words* their powers:

> "and as such [they] are members of the municipal police force and exercise the legal powers of peace officers in their work as plant guards." *Id.* at 430.

There is nothing here or elsewhere in the opinion to indicate that such definition is anywhere contained in Section 188 itself and we

Appellant Gaither responds that such "policy" choices as articulated above and in *Singleton* are properly left to the legislature (Gaither Br. at 31). He then urges nonetheless construction of the statute in a manner such that "Officer Peace could not validly arrest defendant on July 7, 1967" (Gaither Br. at 32). Under the guise of pressing assertedly appropriate judicial inaction, appellant Gaither rather seeks a favorable adjudication of his claim. We think it apparent that *any* decision rendered by this Court on Section 115 as it affected appellant Gaither below is a pronouncement on its ambits and a construction of its words. And we think the consequences of any such pronouncement on the community cannot be pushed to the side as inappropriate considerations, as appellant would have it.[22] Moreover, notwithstanding any decision this Court might render, the Congress and the City Council are free to alter the effects of Section 115 as they choose. That they have not done so in the period following *Singleton* is rather some further indication that the nugatory construction pressed by appellant in opposition to *Singleton* has no present legislative favor.

Moreover, wholly apart from any statutory powers of arrest as a special police officer, Peace could have properly affected appellant's arrest as a private citizen. A private citizen may lawfully arrest the perpetrators of all felonies and misdemeanors constituting breach of peace committed in his presence if he possesses the requisite probable cause. *Shettel* v. *United States*, 72 U.S. App. D.C. 250, 113 F.2d

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think the inference as likely that the Supreme Court rather construed the powers of the appointed police from the commissions 188 authorized. Accordingly, we think unwarranted appellant Gaither's statement that "the legal powers of the guards in *Jones Laughlin* were *defined* by local Cleveland ordinance, which made them members of the Municipal Police Force exercising powers of special police officers. See *Id.* at 430" (Gaither Br. at 31).

[22] Appellant Gaither himself suggests that "[s]trong countervailing arguments can be made that the abuse or apparent abuse of arrest power poses too great a risk of civil disturbance for the community to entrust such powers to untrained or self-trained personnel" (Gaither Br. at 31). He makes none however.

34 (1940); *Davis* v. *United States*, 16 App. D.C. 442 (1900); *Singleton* v. *United States*, 225 A.2d 315 (D.C. C.A. 1967); *Restatement* (Second), Torts, § 119. Having observed appellant steal from the rack at least three sport coats which he later testified were valued at between $45 and $125 per coat (H. Tr. 16), we think Special Officer Peace acting as a private citizen could properly have arrested appellant for the felony of grand larceny. Appellant Gaither attempts to avoid this result by relying on testimony of the officer that mentally he did not calculate the total assessed value of the sport coats prior to arrest and determine it to exceed one-hundred dollars, the minimum as it were, for a felony. (Gaither Br. 28, 29). We know of no such basis for so stringent a calculative requirement nor has appellant suggested any. Having seen appellant deposit at least three sport coats into the bag, sport coats whose value from personal experience and as a special officer Peace knew to be at least $45 per coat, we submit Officer Peace acting as a private citizen might lawfully have detained appellant for the felony he had just witnessed appellant commit.

Moreover, irrespective of the value of the goods, the larceny committed by appellant in the presence of the officer constituted a breach of the peace. At common law, breach of the peace was defined to be "the use of force, or the threat of an immediate use of force, toward the person or land *or chattels* of another which constitutes a crime. . ." *Restatement* (Second), Torts, § 116[23] (emphasis supplied). Accordingly, appellant by force having stolen chattels belonging to Woodward and Lothrop committed a breach of the peace sufficient to justify his arrest by those private citizens present and so aware during commission of the offense.[24] Thus, without regard to the pur-

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[23] The common law is in force in the District of Columbia through the first sections of the Organic Acts of 1801 and 1901 (2 Stat. 103; 31 Stat. 1189).

[24] And see 22 D.C. Code § 2901, which in defining "force or violence" constituting robbery includes among others the "stealthy seizure or snatching". We do not think appellant Gaither can es-

view of Special Officer Peace's powers as Special Police Officer, we think he might lawfully have arrested appellant acting in the capacity merely of a private citizen.[25]

**II. The complaint charging appellants with commission of the larceny was properly sworn to.**

Appellants vigorously argue that following their arrest, Special Officer Leonard Peace was erroneously caused to

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cape the fact that force was used to accomplish the taking of goods from Woodward and Lothrups by the mere fact that he used stealth instead of bodily pushing clerks aside to get at the goods.

[25] Appellant Gaither makes a last ditch stand asserting that even if lawfully arrested by Peace acting as a private citizen, *Shettel* authorized only police officers and not private citizens to conduct searches incident to lawful arrests. Our response is fourfold. First, we think the sport coats were not revealed by any search. Officer Peace saw the sport coats put into the shopping bag and upon arresting appellant confiscated it. At best there was a seizure of goods belonging to Woodward and Lothrups by its agent. Second, *Shettel* simply did not authorize only police and no others to conduct searches incident to a lawful arrest. Appellants intimation to that effect is incorrect. Third, the Fourth Amendment prohibits only unreasonable searches. It is appellant's burden to demonstrate that following his lawful arrest, the seizure of the jackets (and search for them as well assuming there was one) was unreasonable. He has suggested no reasons to this end and we think there are none. And we see no reason why the general rule—that following a lawful arrest contraband, fruits of the crime, and instrumentalities may lawfully be searched for— should not therefore apply in these circumstances. And fourth, even if Peace acted "without a shadow of authority" as a private citizen in an unreasonable manner, we do not think such deficiency disadvantages the Government from use of evidence so secured. *Silverthorne Lumber Co., et al.* v. *United States*, 251 U.S. 385 (1914).

Appellant Gaither also deems erroneous the failure of Judge Gasch to make written findings of fact (Gaither Br. 32-34). Full and lengthy hearing was held on the suppression issue. The testimony of Special Officer Peace and his partner was almost totally consistent on every detail. Appellant Gaither's intimations to the contrary are incorrect. We take it that Judge Gasch plainly found his description of the events entirely credible, a description in which Peace saw appellant take the goods and caught him red-handed. We agree with Judge Gasch that "[t]he record is replete with probable cause, and there is no need to recopy the record in this order" see Order of February 6, 1967 denying motions for arrest of judgment and new trial.

swear to the verity of the facts alleged in the complaint against appellants before a deputy clerk of the Court of General Sessions rather than a committing magistrate. We think appellants' contention is meritless and the acerbity they bring to bear in its support wholly inappropriate.

The facts below are clear. On July 7, 1967, appellants were observed in the commission of a grand larceny from Woodward and Lothrops. They were immediately arrested. Thereafter, on July 8, they appeared before Court of General Sessions Judge Thomas Scalley, sitting as a committing magistrate for presentment and preliminary hearing. After appellants were advised of their rights, Special Officer Peace took the stand and testified under oath to appellants' commission of the larceny the previous day. On the basis of that testimony, Judge Scalley found probable cause to believe appellants perpetrators of the offense and ordered them bound over to the grand jury. Sometime after arrest and prior to presentment and the preliminary hearing, Special Officer Peace swore out a complaint against appellants in which he stated that they had taken and carried away from Woodward and Lothrops the previous day "five men's sport coats". He gave his oath to the verity of that statement to a deputy clerk in the Court of General Sessions. Appellants now assert that Rule 3 of the Federal Rules of Criminal Procedure required that Special Officer Peace instead swear before a committing magistrate. And appellants thereafter assert that the United States Attorneys Office has and continues to practice "deliberate non-compliance" with that purported requirement.[26]

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[26] We note initially that both appellants were represented by counsel during the interim between preliminary hearing on July 8, 1967, and August 30, 1967, when their indictment was filed in open court. Neither then broached the issue of the purportedly void complaint, waiting until well after indictment to do so. Nor did they so move prior to their arraignments on September 15 (Tatum) and September 25 (Gaither). We think the law is clear that their challenges to purported deficiences in preliminary proceedings thereafter following came too late.

[Footnote continued on page 19]

Appellants fail to acknowledge 11 D. C. Code, Section 983,[27] effective January 1, 1964, which explicitly provides that:

> "Each Judge of the District of Columbia Court of General Sessions may administer oaths and affirmations and take acknowledgements. Their clerk of the court and his deputies may administer oaths and affirmations and take ackonwledgements in all cases pending in the court or about to be filed there." [28]

Enacted in the lengthy judicial reorganization bill of 1964, this section is a specific authorization of the propriety of the very practices appellants deem illegal. The Revision Notes by the Congress accompanying passage of the section detail the long history of clerks and deputy clerks receiving oaths upon which were based criminal complaints. We include but a few segments below:

> "[The statute is in part based upon] . . . March 3, 1901, ch. 854, s 54, 31 Stat. 1198, set out as a note under said section 11-712 of the Code [1961 ed.] and, empowering the clerk and deputy clerks of the former police court to administer oaths and affirmations. . .

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[26] [Continued]

In *Ross* v. *Sirica*, —— U.S. App. D.C. ——, ——, 380 F.2d 557, 560 (1967) this Court referred to *Blue* v. *United States*, 119 U.S. App. D.C. 315, 321-22, 342 F.2d 894, 900-01 (1964), *cert. denied*, 380 U.S. 944 (1965), noting that they "were careful there to point out that persons intending to challenge an alleged defect in the preliminary hearing procedure should do so promptly and before trial". Moreover, they noted that "[w]here the accused is adequately represented by counsel in the interim between the hearing and arraignment following the return of an indictment, and where no adequate excuse for failure to raise the preliminary hearing defect earlier is tendered, a serious question of timeliness would be presented". *Ross* at ——, 380 F.2d at 560; see also *Ross* v. *Sirica*, slip opinions of Judges McGowan and Leventhal denying petition for rehearing *en banc*, at 5.

See also *Green* v. *United States*, D.C. Cir. No. 21,376, decided May 7, 1968 (unreported). Neither appellant has offered any justification of his tardiness.

[27] The Assistant United States Attorney arguing the case below was unaware of this provision as well.

[28] Appellants' case was before that court as U.S. 6212-67.

> While the sixth paragraph of section 11-754(c), D.C. Code, 1961 ed., extended only the powers of the respective clerks to the former Police Court and the Former Municipal Court to the clerk of the Municipal Court formed from the 1942 merger, and made no reference to deputy clerks in connection therewith, a consideration of the provisions relating to the merger of the two former courts, as a whole, suggest that the legislative intent was likewise to extend, to the deputy clerks of the successor Municipal Court, whatever powers the deputy or assistant clerks of the two former courts had by statute. *Further, according to information received, it is current practice for the judges, clerks and deputy clerks of the present court to administer oaths and affirmations and to take acknowledgements. Therefore, this section so provides*". (Emphasis added.)

And in accord with this Congressional mandate Rule 37 of the Court of General Sessions Criminal Rules explicitly provides:

> "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a judge of this court *or other authorized officer.*" (Emphasis added.)

We think this makes it apparent that Congress expressly intended that deputy clerks be empowered to receive oaths upon which were based complaints in criminal matters.

And we think both Congress and this Court have recognized that felony as well as misdemeanor complaints are properly to be sworn to in such manner. In *Zarega* v. *United States*, 59 App. D.C. 67, 32 F.2d 963 (1929), the accused was arrested without a warrant for felony gambling violations committed in the presence of arresting officers. He appealed claiming that his arrest was based on a warrant wrongly issued by a deputy police clerk. This Court stated, "Zerega was apprehended in the act of violation [of gambling laws]. Therefore no warrant for his arrest was necessary." The court then went on to note that the Act of March 3, 1901, ch. 854, upon which deputy

clerks were authorized to act did not allow them to issue warrants but did to receive oaths and affirmations. We think this is strong indication that all criminal complaints —felony and misdemeanor—might properly be sworn to under the then existing procedure, a procedure explicitly codified in the new § 983. See Revision Notes. Moreover, the statute itself explicitly states that deputy clerks are so empowered "in all cases pending in the court or about to be filed therein".[29] Finally, the Judges of the Court of General Sessions by Criminal Rule 37 are of the same view.

Accordingly, we think Congress, this Court and the Court of General Sessions have explicitly sanctioned the propriety of deputy clerks administering oaths to all criminal complaints and at least to those felony complaints drawn after arrest.

Moreover, we think the Federal Rules of Criminal Procedure are not at all to the contrary where, as here, the oath to be administered is upon a complaint drawn following warrantless arrest. Rules 3 and 4, of course, were intended to insure that no warrant for arrest should issue but upon a showing of probable cause made to a proper judicial officer. Such showing can be made only with the "complaint" issued under Rule 3 sometimes accompanied by supporting affidavits which relate probable cause. Upon such a finding, "a warrant for . . . arrest" or a "summons instead of a warrant shall issue". Rule 4, Federal Rules of Criminal Procedure. The Supreme Court in *Giordenello* v. *United States*, 357 U.S. 480, 485 (1958) put the rules' pre-arrest functions as follows:

> "Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth 'the essential facts constituting the offense charged,' and (2) showing 'that there is probable cause to believe that [such] an offense has been committed and that the defendant has committed it * * *.' The provisions of these Rules

[29] Appellants' case was filed there as U.S. 6212-67.

must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that '* * * no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing * * * the persons or things to be seized * * *,' of course applies to arrest as well as search warrants. (Citations omitted.) The The protection afforded by these Rules, when they are viewed against their constitutional background, is that the inferences from the facts which lead to the complaint '* * * be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' * * * *The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists.*" (Emphasis added.)

Where, however, lawful arrest is made without a warrant and the complaint issues only following arrest, the situation is vastly different. No longer does the complaint represent a judicial determination of probable cause sufficient to justify taking into custody; it is rather instead the basis upon which the preliminary hearing thereafter commences—the formal rendition under oath of the charge against the accused upon which the magistrate thereafter makes his probable cause determination. The Ninth Circuit recently framed its function in these circumstances thusly:

> "The complaint filed [after appellant Byrnes' arrest] for appellant's arraignment [presentment] charged him with soliciting a bribe on or about March 8, 1962. The complaint need only charge the crime, and need not show probable cause on its face, to give jurisdiction to the United States Commissioner. This is not an affidavit for a warrant of arrest. That must show probable cause. *Giordenello* v. *United States*, 1958, 357 U.S. 480, 78 S. Ct. 1245, 2 L.Ed.2d 1503. Upon arraignment, if there has been no indictment, the commissioner must by preliminary examination [un-

> less it is waived] *satisfy himself* there is probable cause to believe that a crime has been committed and that the person arrested has committed the crime. Fed. R. Crim. P. 5(c). But the face of the complaint gives him jurisdiction if it follows the statutory language and if it relates the essential facts constituting the offense charged. *United States* v. *Walker*, 2 Cir. 1952, 197 F.2d 287, *cert. denied*, 344 U.S. 877, 73 S.Ct. 172, 91 L.Ed 679." *Byrnes* v. *United States*, 327 F.2d 825, 834 (9th Cir. 1964).

The reason for the difference in purpose is clear. In the first situation—arrest pursuant to a warrant issued upon a complaint—the facts are known to the authorities who seek the warrant. If the facts are sufficient and are adequately stated upon judicial determination the warrant issues. Here, facts were unknown sufficiently before appellants' arrests to allow for issuance of a complaint and warrant so based. Their arrests were lawfully effected during the commission of the offense in the absence of these documents. Their detention was thereafter scrutinized by Judge Scalley at the preliminary hearing who determined it lawfully based on probable cause. As a device to allow judicial scrutinization of contemplated arrests, the complaint was wholly inoperative in appellants' case below.[30] *cf. Zarega* v. *United States, supra.* Its issuance under oath after appellants' arrest and prior to their preliminary hearing served instead as a formal notice of the charges against them on which their detention was based. It focused the preliminary hearing on the offense at issue and allowed Judge Scalley to make his probable cause determination on the basis of a stated charge. Accordingly, that the complainant, Leonard Peace, swore to the truth of the charges before a deputy clerk instead of a magistrate made no difference whatever.

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[30] We think it apparent that if the complaint had been sworn to before a magistrate immediately prior to the preliminary hearing instead of a deputy clerk, the magistrate would not and could not have exercised at that juncture a review of the legality of appellants' detention prior to presentment and preliminary hearing.

Appellants do not indicate of what if any procedural guarantees they were deprived. They do not specify by what manner the Government was advantaged by the purportedly invalid complaint.[31] *cf. Zarega* v. *United States*, *supra*. Appellants received a full and fair preliminary hearing below at which they apprised of the charge against them and given access to the testimony of Leonard Peace, the eye-witness complainant concerning the events of the previous day which he had observed. They received an explicit finding by Judge Scalley that on the basis of this testimony probable cause existed to detain them for the larceny at issue.

Finally, appellants suggest as the required remedy that their prosecutions be dismissed outright as "nullities . . . void *ab initio*" (Tatum Br. 5, 6).[32] This is surely pre-

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[31] Both appellants inveigh conscious connivance on the part of the United States Attorney to avoid the scrutinous eye of the magistrate by taking the complaint in their case to a deputy clerk. The record contains no such evidence nor do we think any such exists. Moreover, neither can suggest what a magistrate before whom Special Officer Peace purportedly was required to swear might have done that was not done below.

[32] The sole case relied on by appellants in support of their contentions is *United States* v. *Crosby*, Criminal No. 89-61. They cite the case for the proposition that "[f]ive years ago Judge Pine held that Rule 3 of the Federal Rules of Criminal Procedure was violated by the procedures then followed in the Municipal Court . . . whereby the complainant swore to a felony complaint before a deputy clerk instead of a judicial officer" (Gaither Br. at 23). Appellants then go on to note that the Judge's ruling is "not reported" (Gaither Br. at 23). The Government has carefully examined the criminal jacket in 89-61, the orders filed therein by Judge Pine on March 12 and 15, 1963, dealing with counsel's lengthy contentions, and the Court of Appeals decision by opinion of December 20, 1962, in *Crosby* v. *United States*, 114 U.S. App. D.C. 233, 314 F.2d 238 (1962) which preceded the apparent second trial. Nowhere therein have we found remarks purportedly so directed.

Shadoan, *Law Tactics in Federal Criminal Cases*, offered as an alternative source by appellants is no help. The *Crosby* case, mentioned at page 71, footnote 166, is incorrectly cited as "89-62". After noting its unreported character, the source cursorily characterizes the purported holding: "Arrest warrant invalid when based upon complaint sworn to before a deputy clerk and officer's statement of facts sworn to before Assistant United States Attorney without

posterous. In *Blue* v. *United States*, 119 U.S. App. D.C. 315, 342 F.2d 894, relied on explicitly by both appellants, appellant Blue sought dismissal of his indictment on grounds that he waived his preliminary hearing without advice of counsel. This Court there stated in response observations we believe equally appropriate here:

> ". . . [W]e do not feel that there is any necessity to do what appellant asks us to do, namely, reverse his conviction with directions to dismiss the indictment. In light of the generally recognized purposes of a preliminary hearing, it is not without significance that he has couched his prayer for relief here in these terms, rather than urging upon us that the Commissioner's error so impaired his ability to defend himself at his first trial that another should be granted for that reason alone. For this is the precise issue we face in considering whether some relief short of dismissal of the indictment should be affirmed". Id. at 901.

Finding no impairment, this Court affirmed. So here, to paraphrase this Court in *Blue*, we think it is not without significance that appellants have couched their prayer for relief in the terms above noted rather than urging that the erroneous complaint somehow impaired their ability to defend themselves at trial. Indeed, it is not without significance that appellants Tatum and Gaither in their reliance on *Blue* omit to mention the above passage. Whatever the deficiencies in the complaint, and we think them

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any judicial scrutiny". We take this characterization and the apparent facts of the *Crosby* case to support the proposition, with which we are in full agreement, that judicial scrutiny of a complaint is required prior to the issuance of a valid arrest warrant. Here, of course, as we have argued above, no arrest warrant issued and the complaint assumed wholly different functions. Whatever other observations Judge Pine may have made from the bench concerning the pre-1964 functions of deputy clerks of the Court of General Sessions we cannot know. That appellants sole reliance is upon unreported and apparently unwritten statements by a court dealing with an inapposite factual situation prior to the enactment of 11 D.C. Code § 983 is some indication of the persuasiveness of their position.

none, they caused appellants no harm whatever nor deprived them of any judicial determination guaranteed them by the Federal Rules. Absent any such consequences, they do not now deserve reversal.

### III. Appellants were properly indicted.

Charged with the offense at issue by indictment filed August 30, 1967, appellants were found guilty as charged at trial below. They now renew their attack on the manner by which their indictment was procured.

It is settled that judicial proceedings are to be presumed "regular and in accordance with the rules" in the absence of evidence to the contrary. *Turberville* v. *United States*, 112 U.S. App. D.C. 400, 403, 303 F.2d 414, 417 (1962). Appellants do nothing to dispel this presumption. Nowhere throughout the entire course of proceedings below nor in their lengthy briefs now do appellants even remotely proffer any irregularity in the manner by which the jury voted to charge them with the offense at issue and by which that vote was thereafter reduced to writing, verified by the foreman and filed. Nowhere do they suggest what the grand jury might have found by its vote to charge them other than the charge in fact voted—that there was probable cause to believe them the perpetrators of the offense at issue. Nowhere do they show in what manner they were thereafter handicapped by the procedures utilized. We think it manifest that appellants' present attack on the procedures by which they were indicted is not founded on any record irregularity or ambiguity whatever. The unfounded speculative hypotheses they offer instead are an insufficient substitute on which to predicate their claims. *Turberville* v. *United States*, *supra*; *Medley* v. *United States*, 81 U.S. App. D.C. 85, 155 F.2d 857, *cert. denied*, 329 U.S. 822 (1944). And see *Beatrice Foods Co.* v. *United States*, 312 F.2d 29 (8th Cir. 1963), *cert. denied*, 373 U.S. 904.

Notwithstanding this bar, we think appellants' substantive contentions are meritless. Below we set forth the procedures by which appellants' indictment was secured.

On July 3, 1967 in open court a grand jury of 23 residents of the District of Columbia was impanelled. The court instructed the jury and selected one of its members foreman and one deputy foreman. The jury then retired to consider evidence to be adduced before it. On August 2, 1967, evidence concerning the present case was there adduced in the form of testimony by Special Officer Leonard Peace of Woodward and Lothrop. On the basis of that testimony, a majority of the 23 jurors voted probable cause to believe appellants to have committed the grand larceny at issue. The secretary of the jury then recorded the case name, the witness appearing to testify, the offense to be charged and the vote on the issue of probable cause.

On the basis of Special Officer Peace's testimony and the jury's vote thereon, the charge against appellants was thereafter reduced to written form as follows:

> On or about July 7, 1967, within the District of Columbia, Charles Tatum and Tyrone Gaither stole property of Woodward & Lothrop, Washinkton, D.C., a body corporate, of the value of $131.00, consisting of five men's sport jackets of the value of $131.00.

Upon determining the written charge to conform to that voted on August 2, the foreman upon his oath verified it by his signature "a true bill" and with his fellow jury members filed the bill in open court on August 30, 1967. Filed along with it was a shorthand version earlier prepared relating, with the exception of the tallied vote, the recordations of the secretary on August 2. This was also signed by the foreman.[33]

To this procedure, appellants bring constitutional and statutory objections which we treat *seriatim* below.[34]

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[33] Appellants subsequently received a bill of particulars upon their motions further delineating the charged offense.

[34] In our analysis of the procedures below and their constitutional propriety, we attempt to refrain from labeling any particular one "indictment" or "presentment". We think the correctness of these procedures is to be determined upon analysis of their functional attributes and the degree to which they fulfill the constitutional purposes of grand juries, and not upon particular labels one might apply. Moreover, the process of attempting to distinguish between

### A. *The procedure by which appellants were indicted comports with the demands of the Fifth Amendment.*

The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand juries. Its purpose is "to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes". *Costello* v. *United States*, 359 U.S. 350, 362 (1955). To that end the grand jury is largely "restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed" and that the accused has committed it. *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir. 1965). Appellants contend that procedures by which such finding was made below and thereafter reduced to a written bill of indictment filed in open court were fundamentally unfair and denied them basic Fifth Amendment guarantees. Specifically they claim first that the grand jury was required constitutionally when it voted probable cause to believe them perpetrators of the offense at issue to do so with a written bill of indictment before it, as did its "English progenitor"; they also claim that even if the grand jury be allowed to vote on evidence without a written bill before it, the Fifth Amendment required that once the charge against them was reduced to writing it be submitted to the jurors for a voted ratification.[35] In the absence of either procedure

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"presentment" and "indictment" and apply that distinction to the procedures used below involves insoluble ambiguities of history and language. See for example the extended discussions in *United States* v. *Cox*, 342 F.2d 167 (5th Cir. 1965). Accordingly, we attempt to refrain from such conclusory labels in our analysis.

[35] Appellant Gaither, at least, appears to rest primarily on this latter contention ("Appellant's point, however, is not that the grand jury may not 'act upon the testimony' by voting, after it hears the witnesses, that an indictment should be granted. Appellant's contention is that, when an indictment has been drafted following a prior vote of the grand jury, the indictment in specific terms in which it has been drafted must be submitted for the grand jury to

below, appellants urge their indictment failed to comport with the guarantees of the Fifth Amendment.

1. *The grand jury properly voted probable cause to believe appellants perpetrators of the offense at issue.*

We think appellants' contentions meritless. First, it has been long settled that the vote of jurymen on the issue of probable cause may precede preparation of the draft bill relating the charge. *Hale* v. *Henkel*, 201 U.S. 43, 59, 62, 65 (1906); *Frisbie* v. *United States*, 157 U.S. 160, 163, 164 (1894). In *Frisbie*, defendant was indicted by a bill filed in open court lacking both the signature of the foreman and the inscription "a true bill".[36] Facing the claim that the absence of these items constituted a deprivation of Fifth Amendment guarantees of grand jury indictment, the Supreme Court held that the procedures utilized to obtain the indictment rendered any error by failure of the foreman to verify harmless:

> . . . There is in Federal statutes no mandatory provision requiring such endorsement and or authentication, and the matter must, therefore, be determined on general principles. It may be conceded that in the mother country, formerly at least, such endorsement and authentication were essential. . . . But this grew out of the practice which there obtained. The bills of indictment or formal accusations of crime were prepared and presented to the grand jury, who, after investigation, either approved or disapproved of the accusation, and indicated their action by the endorsement, "a true bill" or "ignoramus" . . . and all bills thus acted upon were returned by the grand jury to the court. In this way the endorsement became the evidence, if not the only evidence, to the court of their

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vote upon whether such indictment is or is not a true bill" Gaither Br., fn. 1 at 18.) Nonetheless, we deem is adviseable to treat both contentions.

[36] The indictment was rendered by a federal grand jury for violation of a federal pension statute by filing fraudulent claims.

> action. But in this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment. Thus they return into court only those accusations they have approved, and the fact that they thus return them into court is evidence of such approval, and the formal indictment loses its essential character. (Citations omitted). *Id.* at 163, 164.[37]

Seven years later in *Henkel*, the Court noted, "[w]hile no case has arisen in this court in which the question has been distinctly presented, the authorities in the state courts largely preponderate in favor of the theory that the grand jury may act upon information received by them from the examination of witnesses without a formal indictment or other charge previously laid before them". *Hale* v. *Henkel*, *supra* at 62. After citing *Frisbie*, it went on to note that "the rulings of the inferior Federal courts are to the same effect". *Id.* at 63. Lest any doubt remain, it concluded "[w]e deem it entirely clear that under the practice in this country, the examination of witnesses need not be preceded by presentment or indictment formally drawn up. . ." *Id.* at 65. Accordingly, we think it manifest that no constitutional infirmity whatever inhered in the procedure below by the fact that the grand jury when it voted probable cause to believe appellant guilty of the grand larceny did so without a draft bill of indictment before it.

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[37] We think the Federal Rules of Criminal Procedure similarly contemplate these procedures. The Advisory Committee Notes to Rule 6(c) specify that "(f)ailure of the foreman to sign or endorse the indictment is not an irregularity and is not fatal, *Frisbie* v. *United States*, 157 U.S. 160, 163-165." See Advisory Committee Notes to Federal Rules of Criminal Procedure at 12.

2. *The voted charge was thereafter properly reduced to written form, verified by the foreman and filed in open court.*

Appellants' second assertion of constitutional error deals with the clerical procedures by which the charge voted against them was reduced to writing by the United States Attorney's Office, verified thereafter by the foreman as "a true bill" and filed in open court. Because the draft, once written, was not submitted to the grand jury for a ratification vote but verified solely by the foreman, appellants claim this allowed the United States Attorney to decide "himself upon the terms of the indictment without their submission to the grand jury" (Gaither Br. at 19), that the draft might not reflect the true sense of the grand jury, and that his procedure left open "the possibility of mischief itself" on the part of the Government" (Tatum Br. at 8).

We take the gist of these claims as directed to the proposition that the written bill of indictment filed in open court on August 30, 1967 was not necessarily reflective of the grand jury's earlier vote.[38] Confined as they are to the facts of this case,[39] appellants' intimations of

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[38] We note initially that courts are inordinately reluctant to entertain challenges to the substantive decisions of grand juries. *Costello* v. *United States*, 350 U.S. 359 (1955); *Blair* v. *United States*, 250 U.S. 273 (1919). In *Costello*, appellant attempted to challenge the grand jury finding as based on unreliable hearsay. The Supreme Court denied him such attack in part responding,

> "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more". *Id.* at 363.

Appellant in *Blair* was foreclosed from a challenge to the subject matter jurisdiction of the grand jury and the claim that the indictment returned against him was outside its ken. Insofar as appellants now attempt to contest the adequacy and sufficiency of the evidence supporting the probable cause finding of August 2, we think they are consequently foreclosed from such attack.

[39] *United States* v. *Raines*, 362 U.S. 17, 21 (1950); *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1884).

irregularity, inaccuracy and discretional latitude in the processes following the vote are wholly unfounded in this record. Special Officer Peace had signed the original complaint and testified at the preliminary hearing. He had given the police a statement and made a summary statement to the United States Attorney's Office prior to testifying before the grand jury. The United States Attorney through his assistants was thus familiar with Peace's testimony prior to bringing him before the grand jury. He was present with the officer during his testimony there and assisted in adducing it. Thereafter, he was informed by the jury through its recordations that on the basis of Special Officer Peace's testimony, the jurymen voted probable cause to believe appellants perpetrators of the grand larceny at issue. The voted charge was then reduced to written draft. It was perused and verified by the foreman under oath as reflective of the earlier vote and "a true bill" and filed in open court. Appellants were then tried and convicted of the offense there charged, Special Officer Peace again testifying to its commission by them. We reiterate that appellants do not suggest what variance might have inhered in the grand jury's finding that was later reduced to written form and filed nor what other irregularities therein prejudiced them.[40] Accordingly, we think foreclosure is appropriate. *Turberville* v. *United States, supra.*[41]

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[40] Appellant Gaither does contend that since the United States Attorney was not present during the vote, he can never "know" just what the grand jury voted (Gaither Br. at 20). While his absence might well pose ontological problems, we think it plain that for all practical purposes the United States Attorney was well apprised on the intention of the grand jury by its vote to indict.

The United States Attorney present when the offense at issue was related by Special Officer Peace and thereafter informed that the jury voted to indict appellants for grand larceny, we think the intention of the grand jury vis a vis appellants made itself wholly explicit.

[41] Where precisely the same argument was put before Judge Gesell in *United States* v. *Jeffries et al.*, Cr. No. 623-68 (unreported), he replied:

> "Defendants also urge that under the challenged procedures the prosecution may amend the indictment after the grand

Moreover, we think this second assignment of constitutional error incorrect on its merits. We suggest it long settled in this country that bills of indictment drawn at the behest of the grand jury following an affirmative probable cause vote require at most verification by the signature of the foreman. We reiterate that the Supreme Court in *Frisbie* indicated constitutionally acceptable the practice whereby only "after determining that the evidence is sufficient to justify putting the party suspected on trial . . . [does the grand jury] . . . direct the preparation of the formal charge or indictment". *Frisbie* v. *United States, supra* at 163. As a consequence, "they return into court only those accusations they have approved. . .". *Id.* at 163. Because these indictments and no others are thereafter returned to court, the return itself is sufficient authentication of the grand jury's decision.

Although *Frisbie* by its terms deals with the device of authentication by signature, we suggest its terms equally applicable to the need for other verificative procedures, including that now pressed as constitutionally required by appellants. Moreover *Frisbie* was decided some eight years after *Ex Parte Bain*, 121 U.S. 1 (1886) dealing with improper amendment of the indictment once voted by the grand jury. That the court in *Frisbie* saw no *Bain* problems in the procedures involved is some further indication that they are consitutionally acceptable and contain none of the alleged *Bain* affirmities appellants suggest (See Gaither Br. at 18, 19).

We think the cases relied on by the Supreme Court in *Frisbie* and *Hale* rather support this view. The court's analysis in each rests heavily on *Commonwealth* v. *Smyth*, 11 Cush. 473 (1853) and *State* v. *Magrath*, 44 New Jer-

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jury votes and recite facts different from the evidence on which the grand jury relied. This, of course, implies dishonorable conduct by the prosecution and there is nothing before the Court to suggest this type of intrusion on the proper function of the grand jury". At 2 of Memorandum Opinion of August 7, 1968.

sey L. Rep. 227 (1882),[42] cases in which the highest courts of Massachusetts and New Jersey dealt with the failure of indictments to contain purportedly necessary verification by the foreman. Both courts in light of the procedures by which the indictments were obtained viewed such verification as marginal and of no added value. Chief Justice Beasely speaking for the New Jersey Supreme Court noted:

> In our procedure, bills are not drawn up beforehand and presented for adoption or rejection by grand jury, but, to the contrary, they are drawn subsequently to the investigation, and consequently there are no bills in this course of law which are marked 'not found'. The result is that all the bills which the grand jury bring into court such as have been found by them, and therefore the act of presenting them to the court is a certification that they have been officially found. . ." *State* v. *Magrath, supra* at 230.

Justice Merrick speaking for the Supreme Judicial Court of Massachusetts stated:

> No formal bills are ever previously prepared to be preferred before them [the grand jury], as in the English practice but they receive and act upon all complaints which any individual may think fit to submit to them, and determine in what cases accusations shall be made. In these decisions, they always act for the commonwealth and never for a private prosecutor. Bills of indictment are drawn up by the attorney for the government under their direction, and in conformity to their decisions. They return these, and no other bills whatever, into court, and they are the only presentments made upon which parties charged with the commission of criminal offenses are arraigned for trial. The bills of indictment so returned are received by the court as official accusations of the grand jury, and placed upon its files and made part of its records." *Commonwealth* v. *Smyth, supra* at 475.

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[42] *Frisbie* v. *United States, supra* at 163 and *Hale* v. *Henkel, supra* at 63.

Again, we think it apparent from *Smyth* and *Magrath* that unlike the English practice, the American practice of indictment has as its hallmark the fact that written bills are never placed before the grand jury, either before or after the vote to indict. And such procedure is surely acceptable upon compliance with the admonition of the Supreme Court in *Frisbie* that although not vital it is preferable "that the indictment be endorsed according to the ancient practice ["a true bill" signed by the foreman], for such endorsement is a short, convenient, and certain method of informing the court of [the grand jury's] action." *Frisbie* v. *United States*, *supra* at 164. Below, after the written bill was prepared at the grand jury's direction and prior to its filing, it was read and signed by the foreman to be "a true bill". It was also attested to by the United States Attorney. We think this leave no room whatever for appellants' speculation that the written indicment filed in open court did not authentically render the grand jury's vote of August 2.[43]

Appellants' response is founded on the premise that the grand jury constitutionally is required to operate in a manner in all respects like that of its "English progenitor" which they assertedly derive from *Costello* v. *United States*, *supra* at 362. Hence it is reasoned that written bills of indictment must be placed before the grand jury sometime prior to the jury's vote, as was the practice in the days of Blackstone and Stephen before him (Gaither Br. at 16, 17). *Costello*, of course, dealt rather with the use of hearsay testimony by the grand jury as a basis for its decision and the unassailability of the prerogative. We think it plain that it affected in no way the long settled statement by the Supreme Court in *Hale* that "[W]e deem

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[43] See *Commonwealth* v. *Smyth*, *supra* at 475, where in the absence of the endorsement "a true bill" the court said notwithstanding, "When, in addition to this course of proceeding, the indictment is verified by the signature of the foreman of the grand jury, and bearing upon its face the attestation of the public prosecutor, there is no reason why its authenticity or character as a valid official accusation shall be afterwards brought into question". See also *State* v. *Magrath*, *supra* at 229.

it entirely clear that [unlike the English practice] under the practice in this country, the examination of witnesses [by grand juries] need not be preceded by a presentment or indictment formally drawn up. . ." *Hale* v. *Henkel*, *supra* at 65. Nor do we think *Costello* in any way affected the settled rules of *Frisbie* or otherwise locked the American grand jury into sixteenth century English forms. Appellants also rely on the settled line of cases to the effect that once drawn and filed, the indictment may not be amended during the course of trial, arguing that by analogy the prosecutor here likely amended it during the initial drafting (Gaither Br. at 19). We reiterate that appellants offer nothing to support this speculation nor suggest what other decision the grand jury might have reached than that probable cause existed to find them the culprits of the offense at issue. Moreover, as we have argued, the Supreme Court in *Frisbie* and *Hale*, following *Ex Parte Bain*, *supra*, almost explicitly sanctioned precisely the procedures used below to reduce the voted charge against appellants to writing and thereafter to file it. In the total absence of any irregularity whatever in that process, we think appellants received their every due and have no cause to claim deprivation of any Constitutional rights.

### B. *The procedure by which appellants were indicted comports with the demands of the Federal Rules of Criminal Procedure.*

Appellants also urge that the procedures by which they were indicted are proscribed by the Federal Rules of Criminal Procedure. We think the arguments here advanced are also incorrect.

Appellants argue that Rules 6(c) and (f) require the grand jury vote on a written draft prior to the indictment's being filed in open court. Rule 6(c) provides in part:

> "The foreman shall have power to administer oaths and shall sign all indictments. He or another juror designated by him shall keep a record of the number

> of jurors concurring in the finding of every indictment, and shall file the record with the clerk of court . . ."

Rule 6(f) provides in part:

> "An indictment may be found only upon the concurrence of 12 or more jurors."

Appellants assert that "when the draftsmen spoke of an indictment being 'found', they were using the term in its traditional common law meaning", that is, that existing indictments were before the grand jury upon which a vote was taken and the foreman thereafter marked 'a true bill' or 'ignoramus' (Gaither Br. at 21). Appellants offer no support for this assertion and we think there is none.

At the very least, we think Judge Gesell in *United States* v. *Jeffries, et al., supra*, was decidedly correct when he stated in response to a similar claim:

> "There is no provision of the Federal Rules of Criminal Procedure that requires the vote to be taken either before or after drafting of the indictment. Rule 6(f) states that an indictment may be "found" upon the vote of 12 or more jurors, but there is nothing in the rule or its history which suggests that the word 'found" requires that the indictment be physically in existence at the time. Nor does Rule 7 throw any light on the issue. Apparently the practice varies in different federal jurisdictions but this jurisdiction is in no way unique in following the procedures outlined above." Memorandum Opinion of August 7, 1968 at 2 (unreported).

The short of it is that the Federal Rules contain nothing indicating the reversion of common law practice appellants propose. Moreover, we strongly submit that the framers of the Federal Rules contemplated as acceptable the practice utilized below. As to Rule 6(c), upon which appellants pitch much of their argument, the Advisory Committee noted in part that "[t]his rule generally is a restatement of existing law" and went on to specify that "[f]ailure of the foreman to sign or endorse the indict-

ment is an irregularity and is not fatal, *Frisbie* v. *United States*, 157 U.S. 160, 163-165 "" thus incorporating the Supreme Court's discussion therein concerning the difference between American and English indictment procedures and the resulting perfunctory nature of the foreman's signature on the draft bill once filed.[45] We think this is a strong indication that the framers of the Federal Rules approved of the method of indictment common in this country and sanctioned in *Frisbie*, wherein bills of indictment were drafted after the voted charge by the grand jury.

And indeed, because the rules intend that failure of the foreman to endorse the bill once prepared is but an "irregularity" and is "not fatal", we think of necessity they contemplate as the usual case that in which the bill of indictment once prepared goes thereafter to court with no ratification of the written draft by a second vote. That

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[44] Advisory Committee Note To Federal Rule of Criminal Procedure 6(c).

[45] We reiterate a part of the court's lengthy discussion there from 163-165.

> . . . . There is in the Federal statutes no mandatory provision requiring such endorsement and or authentication, and the matter must, therefore, be determined on general principles. It may be conceded that in the mother country, formerly at least, such endorsement and authentication were essential . . . . But this grew out of the practice which there obtained. The bills of indictment or formal accusations of crime were prepared and presented to the grand jury, who, after investigation, either approved or disapproved of the accusation, and indicated their action by the endorsement, "a true bill" or "ignoramus" . . . and all bills thus acted upon were returned by the grand jury to the court. In this way the endorsement became the evidence, if not the only evidence, to the court of their action. But in this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment. Thus they return into court only those accusations they have approved, and the fact that they thus return them into court is evidence of such approval, and the formal indictment loses its essential character. (Citations omitted). *Id.* at 163, 164.

the framers intended the missing signature have no such common law character rather indicates a conscious acceptance of the American practice of indictment, as outlined in *Frisbie* and cases there relied on, wherein written drafts are never put before the grand jury during any stage of the process prior to the return in open court. Accordingly, we think at the very least the Federal Rules do not proscribe the method of indictment appellants now challenge and indeed they likely approve it.

Appellants also claim that the method of indictment used below was essentially a "presentment" and that such a method was disapproved by the Federal Rules as "not meeting constitutional standards" (Gaither Br. at 21). In the first place, the Fifth Amendment sanctions the use of presentments to initial prosecutions. We take it as clear that the Federal Rules in no way read that mode of initiating prosecution out of the Constitution, nor did they intend to. Rather the Advisory Committee noted only that, "[p]resentment is not included as an additional type of formal accusation since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts". Advisory Committee Notes to Rule 7(a) at 15. And we think it apparent that notwithstanding this purported obsolescence, federal grand juries continue to utilize presentment powers. See, e.g., *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956).

Moreover, as we noted earlier, we do not think the issues here presented turn on the labels one attaches to the various stages of the indictment process below. Rather, it is the functional attributes of those procedures and the degree to which they fulfill the appellants' Fifth Amendment guarantees which are crucial. Without again detailing arguments earlier made, we think appellants received every constitutional due by the procedures below in which the grand jury voted probable cause to believe them the perpetrators of the offense at issue. And we think the Federal Rules of Criminal Procedure cast no infirmities on those procedures. Accordingly, we think appellants' reliance on particular labels is irrelevant.

However, we note the following about the extent to which the probable cause vote below constitute a "presentment" rather than an "indictment". Judge Wisdom, in *United States* v. *Cox*, *supra* at 187, related Blackstone's definitions of presentment as follows:

> "A presentment, *generally* taken, is a very comprehensive term; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, *properly* speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king."

We think it apparent that the action of the grand jury below, not taken of their own initiative with regard to an offense within their own knowledge, or observation, was not a "presenment" in the common law sense of that term. And it is this "strict technical meaning" which the framers of the Federal Rules viewed as obsolete.

Rather, we think the vote of the grand jury finding probable cause to believe appellants perpetrators of the grand larceny at issue, based on testimony of Special Officer Leonard Peace, corresponded in all material respects with that process historically known as "indictment". As *Frisbie* makes clear, that correspondence is not any the less merely because the bill of indictment is not drawn until after the vote. To the extent the generic term "presentment" covers this as well, as Blackstone indicates it does, we think the vote might also be termed "presentment".[46] We cannot conceive that appellants can manufacture reversible error by such label.

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[46] And we think this the sole sense in which the shorthand form urged by appellant to constitute a formal presentment uses the term (We, the Grand Jurors of the United States of America, in and for the District aforesaid, upon our oaths, do PRESENT").

**IV. The court below committed no error in not examining grand jury testimony following receipt of the guilty verdict to determine if appellant Gaither was prejudiced by its unavailability.**

Appellant Gaither contends that the trial court erroneously failed to peruse the grand jury testimony of Special Officer Leonard Peace following the verdict to determine whether its unavailability at trial had prejudiced him (Gaither Br. 35, 36). We disagree.

***A. Appellant Gaither's request for production of grand jury minutes was decidedly tardy. He has no recourse to the remedy he now seeks.***

(H. Tr. 1-31, S-5—S-8; Tr. 34, 40-49)

Able and experienced trial counsel was appointed appellant Gaither on September 25, 1967. Numerous motions for discovery were thereafter filed and granted. On December 8, a lengthy suppression hearing was held at which Special Officers Peace and Krauss testified at length concerning commission of the offense (H. Tr. 1-31). Counsel for both appellants cross-examined each witness vigorously about virtually every aspect of the offense. Counsel for appellant Gaither at this hearing also raised objections about purported inadequacies in the indictment and the degree to which the Government was assertedly free to disregard testimony before and findings of the grand jury (H. Tr. S-5—S-8). Not once throughout the several discovery motions, the argument before Judge Gasch or the lengthy testimony of Special Officers Peace and Krauss did counsel ever raise the barest hint of a need for grand jury minutes. Nor was such suggestion made during the intervening two weeks between the suppression hearing and trial.

Rather, appellant Gaither through experienced counsel first broached the need for grand jury testimony on the morning trial began.[47] At this juncture he was armed

[47] Counsel explained that he thought *Dennis* required that no request for production of grand jury testimony was properly to be made until the close of direct testimony of the witness for whom the minutes are sought (Tr. 40, 49). We think this is incorrect (see *infra* at 45).

with PD-163 statements, statements they had made to the clerk of the grand jury prior to any testimony,[48] and lengthy testimony given two weeks previous at the suppression hearing. (Tr. 40) Because of the failure of appellant to make any previous request, the grand jury minutes were not in transcribed form. (Tr. 40, 49, 50.) Counsel suggested "that since it is the end of the day and this testimony is presumably short, it probably could be transcribed before we could reconvene if we were to adjourn until tomorrow" (Tr. 41). Judge Gasch then gave the following admonition:

> I would think that when counsel has a basis for concluding that there is a particularized need under *Dennis* for the production of grand jury testimony, that as a practical matter, it would be well to advise Government counsel well in advance of the time that the need occurs at trial because it does take some time to write up these pages. (Tr. 41.)

The Government represented that if a "contract reporter" had sat during the December 8 hearing, there might well be at least a two-week delay in obtaining the transcripts (Tr. 41).[49] At the opening of trial the following day, December 20, 1967, the prosecutor made the following representation:

> MR. DAVIS: I have some representations to make to the Court. At the conclusion of yesterday's proceedings, I went to the grand jury room and ascertained there the reporter who was in the grand jury room on August 2, 1967 and did in fact report this case was Miss Phyllis Harper who is a contract reporter working out of the Metropolitan Reporting Office.

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[48] Peace, Krauss and Private Kevin J. Doheny all made statements to the clerk. Trial counsel possessed that sheet below (Tr. 40). Only Special Officer Peace thereafter testified before the grand jury and consequently, his was the only testimony produceable.

[49] As an example, the Government noted court reporter Dwyer who had a backlog of some 11 or so cases (Tr. 42).

> I contacted the Metropolitan Reporting Office and got Miss Harper's home number. Last night I had occasion to talk to her at home. She informed me she is assigned to Adam Clayton Powell's special grand jury and that today she has to complete transcribing that testimony and that she would be leaving the city tomorrow.
>
> She informed me at her home that it would be utterly impossible last night to transcribe that testimony because the testimony was in the files at the Metropolitan Reporting Company and she was at that time transcribing some of the Powell grand jury testimony for today. (Tr. 48-49.)

Willing to provide counsel with the minutes (Tr. 40, 42) but finding them hopelessly unavailable on such short notice, the court then stated that "under the circumstances . . . we will have to proceed without making that testimony available to you" (Tr. 49). It reiterated its earlier admonition that such requests were appropriately made in advance of trial (Tr. 49). Appellant Gaither acquiesced but suggested that "it might be worthwhile having the grand jury testimony transcribed and made available and Your Honor could consider whether it afforded any basis for a new trial" (Tr. 49). The court responded "All right, sir" (Tr. 49) and trial thereafter recommenced.

It is long settled that invocation of constitutional and statutory rights must be timely made. Where the accused at trial seeks to bar the receipt of evidence on such grounds, he cannot be tardy in so moving. Accordingly, objections to introduction of evidence assertedly procured in violation of the Fourth Amendment are too late if made after the evidence is admitted. *Segurola* v. *United States*, 275 U.S. 106, 110-12 (1927); *Mills* v. *United States*, D.C. Cir. No. 21,246, March 22, 1968 (unreported order); *United States* v. *McDonough*, 265 F. Supp. 368 (W.D. Pa. 1967); *United States* v. *Nirenberg*, 19 F.R.D. 421, 422 (E.D. N.Y. 1956). *Cf. Patton* v. *United States*, D.C. Cir. No. 21,161, decided October 29, 1968, fn. 3. Fifth and Sixth Amendment objections to receipt in evidence of statements by the accused must similarly be made in time-

ly fashion. *Ramey* v. *United States*, 118 U.S. App. D.C. 355, 336 F.2d 743, *cert. denied*, 379 U.S. 840 (1964); *Puryear* v. *United States*, 378 F.2d 29 (5th Cir. 1967); *Toland* v. *United States*, 365 F.2d 304 (9th Cir. 1966); *United States* v. *Del Llano*, 354 F.2d 844 (2d Cir. 1965) (*en banc*); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Invocation of the trial court's discretion to bar admission of prior convictions as impeaching evidence must be timely made, and made with sufficient specificity to constitute a meaningful invocation of that discretion. *Hood* v. *United States*, 125 U.S. App. D.C. 16, 18, 365 F.2d 949, 951 (1966).

Where instead of evidentiary exclusion the accused rather seeks production of evidence with a view toward its use at trial, we strongly submit equally applicable the settled rules of timeliness.[30] In the case at bar, appellant Gaither through experienced counsel sought invocation of the trial court's discretion under Federal Rule of Criminal Procedure 6(e) for the grand jury testimony of Special Officer Leonard Peace. He did so initially at the close of the officer's testimony and for the first time informed the prosecutor of his intention to make that request shortly before on the morning of the first day of trial. Circumstances without the control of the court and the Government made impossible preparation of the material sought by appellant for perhaps a period of weeks thereafter. We think appellant Gaither through his counsel was manifestly untimely in this claim. He had failed to so notify the Government in his many motions for discovery in the months before trial (Tr. 49, 50). He made no mention of any such need during the testimony of Special Officer Peace before the court in the lengthy suppression hearing of

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[30] Congress has explicitly recognized this need in the framework of contemplated claims of criminal insanity by the accused at trial. In Title II of the District of Columbia Crime Bill, effective December 27, 1967, it has required of the accused that he give the Government "notice of his intention to rely on such defense" generally not later than fifteen days following arraignment.

December 8 nor in the lengthy argument there held concerning the workings of the grand jury below.

Production of grand jury minutes under Rule 6(e) is of course a matter within the trial court's discretion. *Dennis* v. *United States*, 384 U.S. 855 (1966). In a very real sense we think appellant Gaither's failure to broach the issue in any form either to the prosecutor or to the court prior to the morning of trial effectively deprived the court of all discretion in the matter.[51] Cf. *Hood* v. *United States*, *supra*. Even from the cold transcript before this Court, one can sense the quandary in which Judge Gasch felt himself. Except to recess the trial for perhaps several weeks until preparation of the transcript, the court below had no choice but to continue without it. We think it most properly determined to do so.

Moreover, we do not think appellant can now urge that the court was nonetheless required as a matter of law to peruse the minutes once thereafter prepared for prejudice by their unavailability. The court below, as appellant concedes (Gaither Br. at 35), was willing to make the minutes available to him. By appellant's tardiness in raising the issue in any form, the Court was unable to do so. The failure to obtain the minutes was appellant's own, and

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[51] Appellant Gaither claimed below that *Dennis* did not allow his request prior to the close of direct examination of Peace at trial. *Dennis* contains no such language. While disclosure may be denied until the witness has testified at trial (*Allen* v. *United States*, D.C. Cir. No. 20,955, decided January 25, 1968), the request or at the very least *notice* of intention to make the request should be made pre-trial to allow for precisely the contingency that here occurred. This Court in *Allen* rather sanctioned that procedure:

> Unless the prosecutor represents that there is substantial doubt whether the officer will testify at trial, we see no good reason why the grand jury testimony should not be available through a pre-trial motion. The defendant could obtain the pertinent grand jury minutes before trial by filing a motion to suppress the confession, since our *per se* rule would then make the minutes available as soon as the officer testifies at the pre-trial hearing.

Notwithstanding the time for production, the request or notice of the pending request should be made sufficiently before trial to allow for production of the minutes.

neither the Government's nor the Court's. In this regard we think appellant Gaither below was in no different position than one who would make no motion for production whatever until conclusion of the trial and receipt of a guilty verdict. His own tardiness cannot obtain for him a second time at bat.[52] He has no recourse to the remedy he now seeks.

**B. *In any event appellant suffered no prejudice by the court's failure to peruse the grand jury minutes upon receipt of the guilty verdict.***

We think appellant Gaither suffered no prejudice whatever by failure of the trial court to peruse the grand jury minutes for possible inconsistencies following receipt of the guilty verdict.

First, his showing of need to obtain them was at best marginal. There was no significant time lag between the offense and trial nor between indictment and trial.[53] Special Officer Peace was not in any way an accomplice, informer or hostile to appellant Gaither so as to suggest falsification.[54] The officer had made no prior inconsistent statements in the several items possessed by appellant Gaither.[55] His testimony was not uncorroborated; Special Officer Krauss corroborated virtually every substantial detail of it including unequivocal identification of appellant Gaither as the culprit,[56] and Krauss' testimony as to appellant Gaither was largely uncontroverted.[57] Appellant Gaither explicitly eschewed a defense of mistaken

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[52] And this notwithstanding the trial court's apparent acquiescence in appellant's suggestion that he be so allowed (Tr. 49). We think this clearly provided appellant with more than was legally due.

[53] Compare *Dennis* v. *United States, supra.*

[54] Compare *Dennis* v. *United States, supra.*

[55] Compare *Dennis* v. *United States, supra; Worthy* v. *United States,* D.C. Cir. No. 20,659, decided August 11, 1967.

[56] Compare *Worthy* v. *United States, supra.*

[57] Compare *Gordon* v. *United States,* 112 U.S. App. D.C. 33, 299 F.2d 117 (1962).

identification (Tr. 34).[58] No confession of other incriminating statements of appellant Gaither was related by Peace at any time below.[59] The sole factor suggesting production of the testimony sought was his position as one of two major witnesses at trial.[60] We are unaware of any case which holds this meager showing of need sufficient to require production, particularly in light of the lengthy delay entailed.[61] Accordingly we think the court below might in its discretion properly have denied outright appellant Gaither access to the testimony sought.

Moreover as we noted, appellant Gaither already possessed several prior renditions of the events at issue by Special Officer Peace. The PD-163, preliminary grand jury statement and lengthy testimony before Judge Gasch at the suppression hearing, were substantially consistent among themselves and consistent with the officer's testimony at trial.[62] We think a fifth rendition was hardly crucial to appellant Gaither's case. And we think the tardiness with which he pressed the claim below is some indication that neither did he.

Special Officers Peace and Krauss unequivocally identified appellant Gaither at trial and prior thereto at the suppression hearing. No dispute now exists as to Krauss who did not testify before the grand jury. Cf. *Patton* v.

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[58] Compare *Worthy* v. *United States, supra; Gordon* v. *United States, supra; DeBinder* v. *United States*, 110 U.S. App. D.C. 244, 292 F.2d 737 (1961).

[59] Compare *Allen* v. *United States, supra.*

[60] Immediately before doing away with need requirements, the Second Circuit on the *Dennis* format found this factor—that the witness whose testimony was sought was key—in conjunction with lack of corroboration of his testimony to be an insufficient showing to justify production under Rule 6(e). *United States* v. *Youngblood*, 379 F.2d 365 (1967).

[61] We think the degree of delay entailed is relevant to the threshold of need required to be met. *Allen* v. *United States, supra*, slip op. at 10.

[62] And we suggest all were not inconsistent with Special Officer Peace's testimony at the preliminary hearing on July 8—a further rendition to which appelant Gaither had access.

*United States*, D.C. Cir. No. 21,161, decided October 29, 1968, fn. 3 at 5. As we have indicated, appellant Gaither did not claim mistaken identification at trial.[63] Caught in possession of the goods and not now disputing the intact identification by Special Officer Krauss, appellant Gaither suffered no prejudice whatever by not having the testimony of Peace before the grand jury and cannot now claim likely, nor even reasonably possible, a different jury verdict below had he possessed that testimony.[64]

**V. The court below properly continued trial in the face of appellant Tatum's repeated tardiness and absences.**

(Tr. 123-126, 181, 185, 223)

Appellant Tatum complains that notwithstanding his conduct below, the court was required to suspend trial until he thereafter chose to present himself for further proceedings. We disagree. We think Judge Gasch properly determined appellant to have voluntarily absented himself from trial on the final day and accordingly continued the proceedings.

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[63] Compare *Worthy* v. *United States*, *supra*. Unlike *Worthy*, appellant Gaither was seen during commission of the offense and identified at trial. He was caught in possession of the goods. Accordingly, the strength of the Government's case was overwhelming. And, as we indicate above, the defense of mistaken identity was explicitly eschewed at trial. No other affirmative defenses were offered. And in the renditions of the events at issue by Peace in possession of appellant, no inconsistencies or discrepancies existed.

[64] Cf. *Chapman* v. *California*, 386 U.S. 18 (1967); *McCloud* v. *United States*, D.C. Cir. No. 21,867, decided October 31, 1968 (unreported opinion); *Wilson* v. *United States*, D.C. Cir. No. 20,887, decided January 18, 1968 and D.C. Cir. No. 22,058, affirmed by per curiam order of November 1, 1968. Judge Gasch, having heard Peace testify twice and having heard the unchallenged identification by Krauss as well as other testimony offered, stated in denying appellant Gaither's request that he review the minutes: "Prior minor contradictions in testimony might be important were the case close, or the record unsupported by circumstances which uncontrovertibly indicate guilt, but it is clear that this conviction is not founded on any questionable identification, any statement or confession of the accused, or any other evidence which would raise a denial of grand jury minutes to the status of error." Order of February 6, 1968 at 7. We agree.

It is long-settled that the accused of right may be present at his trial. *Hopt* v. *Utah*, 110 U.S. 574 (1884); Rule 43, Federal Rules of Criminal Procedure. Of equal duration, however, is the proposition that "the defendant may not defeat the proceedings [against him] by voluntarily absenting himself after the trial has been commenced." See Advisory Committee Notes to Rule 43, 1946 Edition of the Rules, cited in *Cureton* v. *United States*, D.C. Cir. No. 21,175, decided April 18, 1968. See also *Diaz* v. *United States*, 223 U.S. 442, 455 (1912); *United States* v. *Vassalo*, 52 F.2d 699 (E.D. Mich. 1931). Accordingly where such occurs, this ". . . shall not prevent continuing the trial to and including the return of the verdict." Rule 43, Federal Rules of Criminal Procedure.

We think the record below[65] amply reveals appellant Tatum to have employed this very tactic below by absenting himself from trial. Following presentment and preliminary hearing, appellant Tatum was released on his personal recognizance. Trial commenced on December 19, 1967. On December 20, 1967, Judge Gasch adjourned the court for the lunch recess at 12:10 p.m. with notice that trial would reconvene at 1:45 p.m. Both appellants arrived late for the afternoon session. Appellant Gaither represented that he had dozed off; Appellant Tatum represented that he was not aware of the time. (Tr. 123, 124, 125.) The court reprimanded appellant Tatum for his tardiness and told him that further such actions would jeopardize his bail status. Appellant Tatum then responded that it would not happen again. (Tr. 126.) At the close of the afternoon session, Judge Gasch admonished both appellants regarding their tardiness:

> "Were it not the 20th of December, you two men would be locked up tonight. I am going to let you go this time with a warning that if you are one minute late tomorrow—9:30 is the time—you are going to jail.

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[65] Judge Gasch filed lengthy minute entries on December 20 and 21 detailing the events surrounding each appellant's absence. They are part of this record.

Do you understand?

All right" (Tr. 181).

Appellant Gaither arrived at trial the following morning at 9:44 (Tr. 185). Appellant Tatum did not appear. At 10:05 a.m. faced with the continuing absence of appellant Tatum the court determined to proceed, with acquiescence of trial counsel for appellant Tatum, to conclusion of the trial. It noted that "the continuing absence of the defendant Tatum will be dealt with at the end of trial". (Tr. 185.) The court made the following statement:

> "I waited half an hour. I instructed the jury to be here at 9:30. Now it is five minutes after 10:00. I think in this case to a significant degree there has been evidence of trifling with the Court. We certainly can't discharge our obligation to try cases unless defendants show up promptly.
>
> I think we will have to proceed . . ." (Tr. 185).

Counsel for appellant Tatum related "no objection" to this course (Tr. 185). Arguments and instructions were then taken. After luncheon recess, at 1:50 p.m. the jury returned with a verdict. Appellant Tatum still absent and the police department not having him in custody, the court determined to receive the verdict in his absence (Tr. 223). Upon receipt of the guilty verdict a bench warrant was issued for appellant Tatum's arrest. Not until January 9, 1968 was it executed and appellant Tatum finally taken into custody. By order of January 15, 1968 committing appellant Tatum for an examination to determine eligibility for the Narcotic Addicts Rehabilitation Act, Judge Gasch found appellant Tatum's absences at trial to have been voluntary.

This Court has recently spoken to this very situation. In *Cureton* v. *United States*, *supra*, slip op. at 8 it made the following statement:

> ". . . [T]aking into consideration the right, the obligation, and that the orderly administration of justice takes account on the one hand of the importance of a

> defendant's presence and, on the other hand, the need for control of the situation by the court, we conclude that if a defendant at liberty remains away during his trial the court may proceed provided it is clearly established that his absence is voluntary. He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away."

We think the record below amply supports Judge Gasch determination that "to a significant degree there has been evidence of trifling with the Court" (Tr. 185) and that appellant Tatum had voluntarily absented himself from the proceedings. Both appellants had been tardy to the afternoon session of December 20. Judge Gasch, having heard their explanations, viewed them skeptically and strongly admonished appellant Tatum in particular that continued tardiness would endanger his bail status. At the close of the afternoon session in tones revealed by even the cold record to be most stern, Judge Gasch informed appellants Tatum and Gaither that were it not the Christmas season, he would lock them up (Tr. 181). He then admonished them that any tardiness the following morning would result in revocation of bond. He told them directly that trial the following morning would begin at 9:30 a.m. and obtained their acknowledgements as to the notice and warnings he had just given. (Tr. 185.) Appellant Tatum was not seen the following morning or anytime thereafter until January 9, 1968 when he was taken into custody by a United States Marshal pursuant to a bench warrant issued on December 21. Appellant Tatum plainly was "aware of the processes taking place". *Cureton* v. *United States*, *supra*. In the face of Judge Gasch's stern admonishments he can hardly claim to be unaware of his "right and obligation to be present".[66] *Id.* And

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[66] Although incredibly he does. Through counsel appellant Tatum now represents:

> "In this case, Tatum, an ignorant Negro, absented himself from the Court unmindful of his rights and obligations. Indeed, he did not willfully flout the wishes of the Court, but

we think the fact that appellant was taken into custody only upon arrest by a United States Marshal over three weeks after trial is a strong indication that appellant Tatum had "no sound reason for remaining away".[47] Accordingly, we think the record amply supports the court's findings below.

Moreover, this Court in *Cureton* reiterated its language in *Cross* v. *United States*, 117 U.S. App. D.C. 56, 325 F.2d 629 (1963) that the accused cannot "frustrate a trial in progress by absconding" and noted several cases indicating "the sort of situation which enables the court to continue the trial." *Cureton* v. *United States*, *supra*, slip op. at 8. Among the cases there noted was *United States* v. *Vassalo*, 52 F.2d 699 (1931), also relied on by the framers of Rule 43, which closely parallels the circumstances below. There, during a joint trial, Vassalo, "who was at liberty on a bail bond, at a noon recess voluntarily absented himself from the courtroom and failed to appear at any subsequent session. No motion for continuance nor objection was made by either defendant, and the trial thereupon [properly] proceeded until its conclusion, resulting in the conviction of both of the defendants". *Id.* at 600. Appellant Tatum through counsel similarly abjured the alternatives below of continuance or objection. On strict notice of the need for his presence and at large for three weeks thereafter until taken into custody, we think Tatum is without claim

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rather, failed, through his own negligence and lack of learning, to be present in the Court Room" (Tatum Br. at 3)

Nowhere does the record before this Court contain such information. Appellant Tatum made no such representations at the sentencing hearing before Judge Gasch when he declined sentencing under the Narcotic Addicts Rehabilitation Act. We do not think appellant Tatum can now by extra-record allegations of ignorance contravene his explicit representation below that his tardiness would not happen again (Tr. 126) or his understanding of Judge Gasch's stern warnings thereafter (Tr. 181).

[47] Appellant apparently concedes his absence was voluntary. The only reason he now offers, albeit extra-record, is that he is an ignorant man "unmindful of his rights and obligations" by "negligence and lack of learning" (App. Br. at 3). We think in the face of the record below this excuse as a matter of law is insufficient to constitute an "involuntary absence".

whatever that Judge Gasch improperly recommenced his trial on December 21.[68]

Accordingly we think the record fully supports Judge Gasch's determination that appellant Tatum voluntarily absented himself from trial in a manner to justify its continuation in his absence.[69]

**VI. Any error in the prosecutor's summation was at the least harmless and likely harmless beyond a reasonable doubt. Appellants do not deserve reversal by it.**

(H. Tr. 11, 12, 17; Tr. 192, 193, 221, 222; A. Tr. 2, 5-6, 24, 25, 26)

At the lengthy suppression hearing of December 8, Special Officer Peace in answer to the questions of appellant Gaither through counsel testified that when he arrested appellant Gaither on July 7, 1967, with the several sport coats in his possession, appellant Gaither had no money or sales slips on his person (H. Tr. 12). During cross-examination by the Government, Special Officer Peace reiterated that appellant Gaither had "no money whatsoever" in his wallet (H. Tr. 17). It was otherwise undisputed at that proceeding. At trial, however, the prosecutor after informing the jury of his intention to elicit such testimony (Tr. 11) failed to question again the officer concerning money or sales slips possessed by Gaither when arrested. Appellants of course refrained from again eliciting this testimony. During closing argument, the prosecutor then made the following statement, objected to by counsel for appellant Gaither.

> "He [Peace] also testified, ladies and gentlemen, that he arrested, searched the defendant Gaither, found no sales slip and found no money" (A. Tr. 5).

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[68] Moreover, no evidence was taken that day. Closing argument, instructions and receipt of the verdict constituted the court's business.

[69] Trial and sentencing occurred prior to announcement of this Court's decision in *Cureton*. By that fact and because *Cureton* itself suggests it, we think remand for hearing and not "new trial" (Tatum Br. at 5) is the appropriate remedy if this Court feels the record insufficient to justify Judge Gasch's determinations.

Whatever the error in the brief remarks to which appellants object, we think it completely harmless and in the circumstances below without affect on appellants' substantial rights, a prerequisite to reversal. Rule 52(a), Federal Rules of Criminal Procedure. Appellants must demonstrate that the comment by the prosecutor deemed erroneous rendered substantial the possibility that the jury's judgment was likely swayed by it and that the jury was thus deterred from a fair consideration of appellants' guilt or innocence. *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946) We discuss below in the relevant framework in which to assay the effect of the prosecutor's remarks that possibility.

In the first place, it is apparent that the circumstances below in no way resemble those in which the prosecutor argued facts to the jury about which he "conspicuously refrained from putting any questions to [the witness] on this point". *Cross* v. *United States*, 122 U.S. App. 283, 284, 353 F.2d 454, 455 (1965). The evidence concerning appellant Gaither's lack of funds when arrested and lack of any other indicia of ownership was contained in virtually every prior rendition Special Officer Peace had made of the events at issue.[70] It was explicitly related by him at the December 8 suppression hearing. It was totally unchallenged. Moreover, this is not a case of the "prosecutor's arguing facts to the jury which he had been unable to get into evidence over defense objection". *(David W.) Garris* v. *United States*, D.C. Cir. No. 21,142, decided February 14, 1968, slip op. at 2. Indeed, the information at the suppression hearing was elicited initially not by the prosecutor but by counsel for appellant Gaither (H. Tr. 12). Rather, we think it clear the prosecutor during summation believed the undisputed testimony concerning Gaither's penniless condition when arrested, related by Peace at the suppression hearing and before, had been testified to at trial as well. Neither the product of con-

[70] See, for example, the PD-163 statement immediately after the offense in which appellants' penniless condition is related.

scious connivance to circumvent rules of fair play nor relating other than established, undisputed testimony, the prosecutor's brief remark was hardly an egregious foul in spirit or effect.

Moreover, the corrective remedies undertaken by the court and the prosecutor as well served to minimize reliance on the brief remark. The prosecutor at the beginning of his argument admonished the jury, "[b]ear in mind that any comment I may make with respect to the defendant is my recollection of the testimony. It is not binding upon you in any manner whatsoever. If your recollection should differ from my recollection, then, of course, it is your recollection that should control your course of conduct while in the jury room" (A. Tr. 2). Immediately after the statement at issue and appellant Gaither's objection to it, the prosecutor again reminded the jury, "it is the jury's recollection of the facts that controls" (A. Tr. 5). And the trial court as well then stated, "Of course the jury makes the ultimate determination whether that is in evidence, whether that is a fact." (A. Tr. 5). It then urged the jury to disregard the statement if its recollection were otherwise: "If it is not in evidence in accordance with your recollection of the testimony, you will disregard the observation of counsel" (A. Tr. 5-6). Again upon the close of argument, the court instructed the jury that they were "the sole and exclusive judges of the facts", and that "[i]f any reference by the Court or by counsel to questions in evidence occurs, it is your recollection of the evidence which controls during your deliberations in the jury room" (A. Tr. 192-193). Finally, the court admonished the jury that they "might consider only the evidence properly admitted from the witness stand and the exhibits admitted into evidence, and facts stipulated to by counsel" (Tr. 193). We think these corrective remedies went far toward dispelling any reliance on the single sentence in the course of the prosecutor's nine page argument on which appellants now focus.[71]

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[71] Compare *Cross* v. *United States*, *supra*.

"The relative strength of the evidence against the defendant[s] is a material factor in weighing whether trial errors require reversal". *Cross* v. *United States*, *supra*, at 285. We strongly suggest the Government's case below was overwhelming.[72] Appellants were virtually caught in the act, appellant Gaither in possession of the several sport coats about to board a down escalator. Two eye-witness identifications were unequivocal, as was Special Officer Peace's description of the manner in which Tatum lifted the coats from the rack and stuffed them into the shopping bag held by appellant Gaither. By testimony at trial, appellant Tatum had purloined several pants from that same area but a few days earlier.[73] Appellant Gaither presented no affirmative defense or explanation of his conduct. "[T]here was not the least hint, nor the slightest scintilla of evidence that payment for the goods was to be a defense." [74] We strongly submit that there is "no doubt that the jury would, even in the absence of the [prosecutor's remark], have convicted in this case because of the circumstances under which appellant[s] [were] apprehended" *McCloud* v. *United States*, D.C. Cir. No. 21,867, decided October 31, 1968, unpublished opinion at 3; *cf. Chapman* v. *California*, 386 U.S. 18 (1967).

We think worthy of note the manner by which appellant Gaither through counsel responded in this summation. During argument, he urged: "I must strongly take issue with Mr. Davis' recollection that Peace testified that the defendant Gaither had no money and no sales slip. It is correct that in his opening statement Mr. Davis said he would prove that. But, Mr. Peace never said that on the stand" (A. Tr. 24). He then went on to urge that the jury have the testimony read back if they had any doubts and again reiterated that Peace made no such remarks.

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[72] The jury was out but thirty-five minutes (Tr. 221, 222).

[73] Appellant Gaither as well although since he eschewed a defense of mistaken identification, that evidence was not admitted.

[74] Order of Judge Gasch of February 6, 1968, denying motions for new trial at 6.

Counsel then offered various hypotheses of innocence concerning those "with empty shopping bag[s] full of clothes before they pay for it" (A. Tr. 24) turning the situation somewhat to appellant Gaither's advantage.

Finally, we think of some relevance the degree to which appellant Gaither through counsel utilized the very tactic which he now deems reversible error. Appellant Gaither did not take the stand at trial nor at his suppression hearing. He offered no testimony whatever. Then during summation, through counsel he made the following representations to the jury:

> "Mr. Gaither just turned 21 years old. Your decision is going to determine whether he can vote for the president of the United States in 1968, his first vote. Your decision is going to determine whether he is a felon, losing his rights, or whether Mr. Gaither is going to walk out of this courtroom because the Government has failed to prove beyond a reasonable doubt the felony they have alleged.
>
> "The decision you make today will be the most important decision in this young man's life.
>
> "Is Mr. Gaither a felon? Is Mrs. Gaither a felon's wife? Is their young daughter, who is too young to understand what is happening, a felon's daughter?" (A. Tr. 25-26).

First, it goes almost without saying that none of this evidence was before the jury.[75] There was no evidence before them of appellant's age, his prior criminal record, or has family. Second, representations concerning disadvantages suffered by appellant Gaither in the face of conviction are patently irrelevant.[76] More than irrelevant, however, they are not properly to be considered by the

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[75] And unlike the material referred to by the prosecutor, there was no ambiguity here. It was clear that no such evidence as this had been adduced.

[76] One can imagine appellant Gaither's response in the face of a similar representation by the prosecutor that he was already a misdemeanant.

jury."[77] *Lyles* v. *United States*, 103 U.S. App. D.C. 22, 25, 254 F.2d 725, 728 (1957), *cert. denied*, 356 U.S. 961. And we think this admonition applies with particular vigor where the jury is asked to speculate about collateral disadvantages from conviction on the order of a vote for president or potential community stigma.[78]

Assuming the brief remark of the prosecutor to which appellant Gaither objects was erroneous, in view of the undisputed evidence on which it was based and the circumstances surrounding the failure of the prosecutor to adduce that evidence at trial, the failure of appellants at any juncture to contest that evidence, the overwhelming strength of the Government's case, the lengthy and specific remedial statements made by the prosecutor and the court,

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[77] Counsel, unlike the prosecutor, gave no admonition to the jury that it was its recollection which controlled.

[78] Resolution of appellant Gaither's present challenge rests on the peculiar facts of this case and the degree to which in circumstances below he was prejudiced to a degree affecting substantial rights. The cases he relies on in support of his claim that he was so affected below all deal with factual situations at variance with this case. *Jones* v. *United States*, 119 U.S. App. D.C. 213, 338 F.2d 553 (1964) involved erroneous supplementation of the evidence at trial during summation, and an averment to the same effect during the opening statement by the prosecutor. This Court reversed the convictions, noting that the Government by its argument had tried to "shore up obvious weaknesses" in a "paper-thin case", therein noting the general rule that "prejudicial error depends, in good part, on the relative strength of the Government's evidence of guilt". *Id.* at 214. As we have argued above, the Government's case below was anything but weak. Strong eyewitness and circumstantial evidence irreversibly linked both appellants to the offense. Moreover, there was a strong basis in evidence adduced below, albeit not at trial, for the prosecutor's statements. Hence, we think *Jones* is a far different matter. *United States* v. *Spangelet*, 288 F.2d 338 (2nd Cir. 1958), *King* v. *United States*, 125 U.S. App. D.C. 318, 372 F.2d 383 (1967), *Stewart* v. *United States*, 101 U.S. App. D.C. 51, 247 F.2d 42 (1957) and *Corley* v. *United States*, 124 U.S. App. D.C. 351, 365 F.2d 884 (1966), relied on by appellant Gaither, all involved highly contested factual situations where the Government's evidence at trial was not overwhelming and the prosecutor's misstatements were directed at crucial "nerve-center" issues. For reasons earlier stated, we think none of these factors obtained below.

and appellant Gaither's own use of the tactic he deems objectionable, we think the remark was harmless and without affect on appellant Gaither's substantial rights."[79]

**VII. The evidence was sufficient to support appellant Gaither's conviction.**

Appellant Gaither urges that the evidence below, particularly that he characterizes as "uncontested", required the granting of his motion for judgment of acquittal (Gaither Br. 44-46). This contention is frivolous.

On appeal, if evidence is asserted to be insufficient, it must be reviewed in the light most favorable to the Government, making full allowance for the right of the jury to draw justifiable inferences of fact from the evidence adduced at trial and to assess the credibility of witnesses. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Morton* v. *United States*, 79 U.S. App. D.C. 329, 147 F.2d 28, *cert. denied*, 324 U.S. 875 (1945). Evidence of appellant Gaither's commission of the offense was overwhelming, including two eye-witness identifications during the offense and his arrest in possession of the purloined goods. He claims now that "uncontested" evidence shows the two special officers did not see him commit the offense. This of course is a question for the jury. Moreover, the sole evidence he points to is the following: a diagram of the store two weeks before the offense apparently showing a display table in front of the rack of sport coats; and testimony by Mr. Thomas that there was a display table in front of the rack of sport coats.[80] We do not see how this aids him,

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[79] The remark at issue concerned only appellant Gaither. However, appellant Tatum, who raised no objection at trial or thereafter, now claims that his conviction should be reversed as well. (Br. 10-15). We think this contention is frivolous. For reasons stated above, the remark was harmless in its affect on Gaither about whom it was made. It was totally without affect on Tatum.

[80] Appellant Gaither was never able to adduce any evidence in support of his theory that a second tall rack of clothing bisected the officers' view.

even if true. In addition, Peace testified that the display units in that area were moveable and that in any event he looked down an aisle when observing appellants commit the larceny.[81] Whatever the conflict in testimony below, and we think it minimal, its resolution was for the jury. Faced with overwhelming evidence of appellant Gaither's commission of the offense and virtually nothing to the contrary, they resolved the facts at issue against him. Appellant Gaither cannot now seek a rehearing on the credibility of the several witnesses against him.

## CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
*United States Attorney.*

FRANK Q. NEBEKER,
ROGER E. ZUCKERMAN,
*Assistant United States Attorneys.*

[81] Accordingly, in no sense was appellant Gaither's meager evidence "undisputed" as he now asserts.

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In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 21,780, 22,148

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TYRONE GAITHER, Appellant

v.

UNITED STATES OF AMERICA, Appellee

---

Consolidated Appeals From the United States District Court for the District of Columbia

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# APPELLANT GAITHER'S PETITION FOR REHEARING

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ROBERT L. WEINBERG
Counsel for Appellant Gaither
(Appointed by this Court)

1000 Hill Building
Washington, D. C. 20006

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 21, 780, 22,148

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TYRONE GAITHER, Appellant

v.

UNITED STATES OF AMERICA, Appellee

---

APPELLANT GAITHER'S PETITION FOR REHEARING

---

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, appellant Tyrone Gaither respectfully petitions for rehearing of this Court's judgment of April 8, 1969, which affirmed appellant Gaither's judgment of conviction. The petition is directed only to that portion of the Court's decision which holds the "flat rule requiring dismissal of indictments not found by 12 grand jurors" should not be applied to the indictment of appellant.

The Government in its Petition for Rehearing appears to be concerned solely with the effect of this Court's decision upon other indictments, returned prior to April 8, 1969, now pending in the Court below. Even assuming arguendo that such indictments

were held to be unaffected by this Court's April 8 decision, appellant contends in Point I of his argument herein that the rule applied "prospectively" to post-April 8 indictments should also be applied to appellant's indictment. In Point II of his argument, appellant contends that the April 8 decision must invalidate prior indictments, including his own, because it establishes a lack of jurisdiction in the District Court.

## ARGUMENT

### I. Recent Supreme Court Decisions, Including Those Relied Upon In This Court's Opinion, Support Application Of A "Prospective" Rule Of Criminal Procedure To The Defendant In Whose Case The Rule Is Announced

The request of the Government's Petition for Rehearing is "... that this Court's opinion of April 8 be in its effect prospective only, applying to those indictments filed after April 8, 1969." (Gov. Pet. Reh. p. 6; footnote omitted.) Apparently in urging a rule that is "prospective only," the Government intends that the rule applicable to post-April 8 indictments not be applied to the indictment in the instant case.

When the Supreme Court has spoken of giving a ruling on criminal procedure "wholly prospective application", or"only prospective application", it has not thereby meant that the new rule was inapplicable to the very defendant in whose case it was announced. This is clear from the Supreme Court's very recent opinion in Desist v. United States, 37 U.S.L.W. 4225 (March 24,

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1969). The Court there held that the rule announced in Katz v. United States, 389 U.S. 347 (1967), prohibiting non-trespassory electronic surveillance, should be applied only to cases in which the surveillance was conducted after the date of the decision in Katz, December 18, 1967. 37 U.S.L.W. at 4228. The Court stated:

> "... We have concluded, however, that to the extent Katz departed from previous holdings of this Court, it should be given wholly prospective application." Id. at 4226. (Emphasis supplied.)

But the "wholly prospective application" of the rule announced in Katz did not mean that the new rule was inapplicable to the electronic surveillance practiced against Katz himself prior to December 18, 1967. The Court pointed out:

> "Of course, Katz himself benefited from the new principle announced on that date, and, as our Brother Douglas observes, to that extent the decision has not technically been given wholly prospective application...." Id. at 4229, n.24.

In Desist the Court also noted: "... we recently held in Fuller v. Alaska, 393 U.S. 80, that the exclusionary rule of Lee v. Florida, 392 U.S. 378, should be accorded only prospective application." 37 U.S.L.W. at 4227 (Emphasis supplied). But the rule had been applied to Lee himself; "only prospective application" refers to its application to other litigants.

Similarly, Justice Harlan's dissenting opinion in Desist, which took strong exception to the majority's "prospective" application of constitutional rules, noted that the majority position

did make an exception from "prospective" application for the litigant in whose case the rule was announced.

> "Upon reflection, I can no longer accept the rule first announced two years ago in Stovall v. Denno, supra, and reaffirmed today, which permits this Court to apply a 'new' constitutional rule entirely prospectively, while making an exception only for the particular litigant whose case was chosen as the vehicle for establishing that rule. Indeed, I have concluded that Linkletter was right in insisting that all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down." 37 U.S.L.W. at 4229 (dissenting opinion)(emphasis supplied).

Under the principles of the Desist majority opinion and of Justice Harlan's dissent, appellant Gaither contends that the "flat rule requiring dismissal of indictments not found by 12 grand jurors" (Slip op. at 18) cannot be made so "wholly prospective" that it is not applied to the defendant in whose case it was enunciated.

In Desist, moreover, the Court gave prospective application to Katz only "to the extent Katz departed from previous holdings of this Court." In the instant case, this Court's ruling does not represent a departure from any previous holding of this Court or the Supreme Court. On the contrary, the procedure held invalid was a violation of a Rule promulgated by the Supreme Court in 1945, Rule 6, Fed. R. Crim. P., as well as a violation of a constitutional principle laid down in 1887 in Ex Parte Bain, 121 U.S. 1. Thus the considerations which moved the Court in

Desist to adopt a "wholly prospective" application of Katz are absent in the instant situation.

The Government has apparently found no great difficulty since April 8 in changing its indictment procedures so that the Grand Jury may vote upon the specific allegations of the indictment. (See Gov. Pet. Reh., p. 6, n.7.) Rather than make these changes sooner, however, the Government apparently chose to await a decision of this Court as to whether or not the challenged procedures were invalid and to run the risk that numerous indictments might be invalidated as a result. The possible effect of the instant case on numerous other indictments was noted in the hearing on the motion to dismiss the indictment in the court below (Dec. 8 Tr. S-28), and must have been apparent to the Government throughout the pendency of this appeal. (The challenge to the indictment procedure had also been raised in several other District Court cases over the past two years; see Brief for Appellant Gaither, p. 18, n.) Even the observation from the bench during the oral argument of this appeal, to the effect that the indictment procedure should be changed regardless of the outcome in this case, evidently did not move the Government to submit for vote of the grand jurors indictments filed since that date. Thus the factor of reliance of law enforcement officers on prior judicial decisions, which moved the Supreme Court to make Katz "wholly prospective" in so far as it departed from the prior decisions, contrasts with the situation here. See also Fuller v.

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Alaska, 393 U.S. 80 (1968).

The four Supreme Court decisions on "retroactive" application of criminal procedural rules upon which this Court relied in the instant opinion (Slip op. at 16-17, n.32 and at 18-19, n.39), likewise support application of the new rule in the case in which it was announced. All four of these Supreme Court decisions involved collateral attacks upon a judgment of conviction. Stovall v. Denno, 388 U.S. 293 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. Shott, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618 (1965).

In Stovall, the Supreme Court declined to apply the Wade rule to the habeas corpus petitioner Stovall, but pointed out that the rule did apply to Wade and Gilbert, in whose cases the rule was announced.

> "We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as

> an insignificant cost for adherence to sound principles of decision-making." Stovall v. Denno, supra, at 301.

In Johnson v. New Jersey, supra, the Supreme Court did not apply the Miranda and Escobedo rules to petitioner Johnson; but those rules were applied in the cases of Escobedo and Miranda, in which they were announced. In Tehan v. Shott, the Griffin v. California rule was not applied to habeas corpus petitioner Shott; but it had been applied to Griffin himself. In Linkletter v. Walker, supra, the Supreme Court declined to apply the Mapp rule to petitioner Linkletter; but the rule had been applied to Miss Mapp in her own case.

In short, appellant submits that the Linkletter line of authorities relied upon in this Court's opinion--whatever their application with respect to other indictments already pending--compel application to appellant of the same "prospective" rule applicable to indictments filed after the date of this Court's April 8 decision. The "flat rule requiring dismissal of indictments not found by 12 grand jurors" should therefore be applied to the instant case, whether or not some different rule is applied to other indictments filed prior to April 8, 1969. The factor of "major dislocation in the administration of justice in this jurisdiction", which this Court considered in determining whether to make its decision apply retroactively to all indictments pending below (Slip op. at 17, n.32), is not a factor in determining whether the "flat rule requiring dismissal" should

be applied to the single indictment of the appellants, Gaither and Tatum.

II. The Defect In The Indictment Procedures Is Jurisdictional And The Indictment Must Therefore Be Dismissed Or Judgment Thereon Arrested

The Fifth Amendment provides: "... No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...."

The Federal Rules of Criminal Procedure require that a felony "... shall be prosecuted by indictment...." Rule 7(a), Fed. R. Crim. P. Rule 6(f) provides "... An indictment may be found only upon the concurrence of 12 or more jurors."

The Court's opinion herein holds that the particular indictment upon which appellant was tried was not "found" by a majority of the grand jury. "... Certainly the jurors' bare decision that appellants should be indicted for grand larceny does not entail that 12 of them did agree, or indeed could have agreed, to a particular indictment for that offense." (Slip op. at 13; footnote omitted.) The Court's invalidation of the indictment procedure was based both upon Rule 6 and its constitutional foundations.

> "We conclude then that Rule 6 requires the grand jury as a body to pass on the actual terms of an indictment. We are impelled to this conclusion largely by the constitutional principles of Bain, Stirone, and Russell, which emphasize the right of the accused to be tried on an indictment which has in each material particular been approved by a grand jury." (Slip op. at 14.)

Since appellant was not "held to answer ... on a presentment or indictment of a Grand Jury," he contends that there was no jurisdiction to impose sentence upon him. The same result flows from the circumstance that he was not "prosecuted by indictment" as required by the Federal Rules of Criminal Procedure, implementing the Fifth Amendment guarantee. Accordingly, his motion in arrest of judgment should have been granted because "the court was without jurisdiction of the offense charged", Rule 34, Fed. R. Crim. P.

The Court's opinion points out that the type of error involved in this case is of the "amendment" type (Slip op. at 15-16) and that a "flat rule" requiring dismissal of the indictment would normally apply. Absent the considerations concerning cases presently pending in the District Court, "the principles of Bain, Stirone, and Russell would require the 'flat rule'". (Slip op. at 16-19 and n.39.)

The "flat rule" established by Ex Parte Bain, appellant submits is a jurisdictional rule. Indeed, the Supreme Court could not have granted relief in Bain unless the amendment had deprived the trial court of jurisdiction, and not been merely an error in the exercise of the trial court's jurisdiction. For the United States Supreme Court at that time had no appellate jurisdiction to review judgments of conviction in criminal cases. The case came before the Supreme Court upon an original application to the Supreme Court for a writ of habeas corpus. Justice Miller noted:

> "Upon principles which may be considered to be well settled in this court it can have no right to issue this writ as a means of reviewing the judgment of the Circuit court simply upon the ground of error in its proceedings; but if it shall appear that the court had no jurisdiction to render the judgment which it gave, and under which the petitioner is held a prisoner, it is within the power and it will be the duty of this court to order his discharge." Ex Parte Bain, 121 U.S. 1, 3 (1887) (emphasis supplied).

The Supreme Court in Bain went on to hold that the deletion from the lengthy indictment of one phrase deprived the trial court of jurisdiction to proceed further:

> "It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. ... It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence." Id. at 13-14 (emphasis supplied).

Similarly in Norris v. United States, 281 U.S. 619, 622-23 (1930), the Supreme Court noted, in reliance upon Bain, that an amendment to the indictment "would oust the jurisdiction of the court."

The jurisdictional consequence of an amendment to an indictment also appears from Carney v. United States, 163 F.2d 784 (9th Cir. 1947). There one count of the indictment was amended with consent of counsel. The amendment changed the reference "K-14h" to"A-14h" in the description of allegedly forged gasoline ration coupons. The Court held, on the authority of Bain, that the amendment had deprived the trial court of jurisdiction to proceed on this count:

> "The order to amend count one of the indictment was error of the most serious kind, for the rule is that no authority exists to amend any part of the body of an indictment without reassembling the grand jury and to do so ousts the court of its power to proceed. This rule has been early defined by the Supreme Court in Ex Parte Bain, 1887, 121 U.S. 1, 13. ...." 163 F.2d at 788.

See also Dodge v. United States, 258 F. 300, 305 (2d Cir. 1919), where an amendment to the first two counts of the indictment was granted without objection and the Court held:

> "... the amendment made in the first two counts deprived the court of power to proceed upon those counts; but this did not affect the right to try the defendant upon the third and fourth counts."

In Bain, the grand jury had at least voted upon an indictment containing the entire charge upon which Bain was tried and convicted (plus an additional phrase which was deleted

by amendment). In the instant case the particular charge upon which appellant was tried was never found by a majority of the grand jury. If the defect in Bain was jurisdictional, the defect in the procedure herein must be jurisdictional too. For Gaither as for Bain, "the indictment on which he was tried was no indictment of a grand jury."

A jurisdictional defect can only be remedied by the return of a valid indictment. Therefore, if the Court upon rehearing reaches the question of disposition of other cases presently pending in the District Court, as the Government's Petition for Rehearing urges it to do, appellant would contend that the defect in those indictments and in his own can not be cured without re-indictment. The alternative allowed the Government of tendering the grand jury minutes and urging that there is no "reasonable possibility that the jurors would not have approved of the indictment actually returned to the court" (Slip op. at 17)--the feasibility of which the Government now critizes in its Petition for Rehearing--would be foreclosed.

## CONCLUSION

For the foregoing reasons, appellant Gaither respectfully prays that rehearing be granted and that reargument be held upon the questions tendered by this petition; and that the judgment of affirmance be vacated and judgment reversing his conviction be entered.

ROBERT L. WEINBERG
Counsel for Appellant Gaither
(Appointed by this Court)
1000 Hill Building
Washington, D. C. 20006

CERTIFICATE OF SERVICE

Copies of the foregoing Petition for Rehearing were hand delivered this 16th day of April, 1969, to the office of the United States Attorney, United States Courthouse, Washington, D. C. 20001; and mailed to Julian Freret, Esq., 1110 Vermont Avenue, N. W., Washington, D. C. 20005, Attorney for Appellant Tatum.

Robert L. Weinberg
Counsel for Appellant Gaither

1000 Hill Building
Washington, D. C. 20006

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,780, 22,148
(Cr. No. 1115-67)

TYRONE GAITHER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

No. 21,864
(Cr. No. 1115-67)

CHARLES TATUM, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

PETITION FOR REHEARING

By opinion of April 8, 1969, a panel of this Court rendered the following disposition of a joint appeal brought by appellants Tatum and Gaither challenging among others the procedures by which their indictments were secured. Determining after lengthy historical analysis "that Rule 6 requires the grand jury as a body to pass on the actual terms of an indictment" and that the procedures below involved ratification of the written indictment drafted after the grand jury's vote solely by the signature of the foreman, the Court held that procedure defective and in error.[1/]

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1/ Slip op. at 18.

Thereafter in disposition of the appeal the Court announced the manner by which similar contentions would be resolved. As to those indictments voted by grand juries and filed after the date of decision, "a flat rule requiring dismissal of indictments not found by 12 grand jurors" is to be applied.[2/] However, because the prior procedure for securing indictments did "provide some safeguards against departure from the grand jury's will" and "because of the serious adverse effect upon the administration of justice in the District of Columbia of dismissal of numerous pending indictments", a different disposition is to be rendered those indictments secured prior to the date of decision. On such bills of indictment, the signature of the foreman raises a presumption that the indictment accurately reflects the will of the grand jury. The presumption, however, is rebuttable. Accordingly, the defense is to have automatic access to grand jury minutes as a vehicle for that attack. Unless upon receipt of the minutes they can show "a reasonable possibility" that the grand jury by the evidence before it would not have approved the written and filed indictment but would have insisted on a change "in some material respect", the indictment ratified solely by the foreman must stand.[3/] Unable to find such reasonable possibility in the present case and finding no other error affecting substantial rights, the Court affirmed appellants' convictions.

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2/ Slip op. at 16-17.
3/ Slip op. at 16-17.

Neither in brief nor oral argument did the parties give specific attention to the problem of retroactivity, the effect of a decision by this Court deeming the indictment process defective on indictments secured by that process prior to the date of decision. We do so here. For reasons set forth below, we ask the panel to re-examine its resolution of this problem and its disposition of future challenges to indictments secured prior to the date of decision, April 8, 1969.

There are upwards of 1100 cases in which indictments have been secured that are now awaiting trial. Approximately 300 are on the ready calendar. These 1100 cases all involved indictments secured under the procedure prior to this Court's announcement of April 8, a procedure whereby the written bill of indictment prepared following the grand jury's voted charge was ratified solely by the foreman. Accordingly, while it is to be presumed that "the indictment reflects the will of the grand jury", that presumption is rebuttable. Access may thus have to be provided the defense to 1100 sets of grand jury minutes.[4/]

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4/ We note that minutes must be provided in cases which might result in pleas as well as those going to trial. By the Court's ruling each of the 1100 indictments is attackable regardless of ultimate disposition.

Facilities do not exist to meet this sudden need. Of the 1100 sets of grand jury minutes, approximately one-half were taken in stenotype by a single reporter, assigned on a full-time basis to the United States Attorney's Office. The other half were taken by several contract reporters. It is physically impossible for these individuals, even if removed from other duties, to provide transcriptions of their notes with even close to sufficient speed to keep the calendar moving.[5/] Accordingly, there are and will continue for some time to be numerous cases otherwise ready for trial which must be delayed for lengthy periods pending preparation of grand jury minutes; and because of the overwhelming task facing necessarily limited resources, there are and will continue to be numerous situations in which because of the absence of grand jury minutes no available case exists to fill trial slots so vacated. As a result, the District Court now and in the near future will find itself faced with the prospect of substantial additional delay atop an already mountainous backlog.

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5/ A reporter's notes are capable of precise transcription and certification as accurate only by the reporter who took them. The regular grand jury reporter working full-time on preparation of the minutes he took could transcribe them at the rate of approximately 50 sets per month. Transcription of his share of the 1100 sets of minutes might thus require something close to a year. Transcription of his share of the minutes for cases now on the ready calendar might require almost three months. Even allowing for those minutes which have been already transcribed for impeachment purposes, a relatively small fraction of the total, it is apparent that substantial delays are entailed in such a procedure.

Moreover, we think it not inappropriate to note that the ready calendar, itself a device to expedite the orderly administration of justice, is now effectively rendered useless for at least the next several months. All of the cases previously certified as ready, by the Court's ruling, now require preparation of grand jury minutes. That task having hardly begun and far from completion in most of the "ready" cases, they require decertification as no longer ready for immediate trial. And as we have indicated, they may not be ready for trial for some time because of the inability of present facilities to churn out upwards of 300 sets of grand jury minutes in the reasonably near future.

Finally, we suggest consideration be given to the effect 1100 "Gaither" hearings and concomittant application of an admittedly "troublesome test" will have on what is already a lengthy pre-trial process. Following upon substantially delayed trials from a reconstructed ready calendar, that prospect surely bears reckoning, particularly in light of the manifest proliferation of pre-trial proceedings in other areas.

This Court in its opinion of April 8 demonstrated an acute sensitivity to "practical considerations" of a sort that "would work a major dislocation in the administration of justice in this jurisdiction"[6/]. We think the three perhaps unexpected consequences

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6/ Slip. op. at 16-17, fn. 32.

now brought to the Court's attention above---the major delay in pending trials to allow for access to as yet untranscribed minutes, the virtual destruction of the ready calendar and the need for its reconstitution, and the effect of 1100 Gaither hearings and the subtle and often lengthy analysis they require on an already lengthy pre-trial process---constitute "practical considerations" of inordinate importance. The sum of their effects would surely work a "major dislocation" in the administration of justice in this jurisdiction.

Accordingly, we ask that this Court's opinion of April 8 be in its effect prospective only, applying to those indictments filed after April 8, 1969.[7/] We note this Court's assessment that the pre-April 8 process of ratification by the foreman does provide "some safeguards against departure from the grand jury's will."[8/] So viewed, the "serious adverse effect upon the administration of justice in the District of Columbia" outlined above and already experienced by the District Court in the few days following the decision is sufficient to outweigh whatever the gain in making

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7/ We have taken immediate steps to conform the procedures by which indictments are secured to this Court's guidance in its April 8 opinion.

8/ Slip op. at 16.

the "presumption that the indictment [signed by the foreman] reflects the will of the grand jury" rebuttable. We ask that in indictments filed prior to April 8, 1969 it be instead irrebuttable.

/s/ DAVID G. BRESS
DAVID G. BRESS
United States Attorney

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney

/s/ ROGER E. ZUCKERMAN
ROGER E. ZUCKERMAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Petition for Rehearing has been served on appellants' attorneys, by mail, Robert L. Weinberg, Esquire, 1000 Hill Building, 839 - 17th Street, N.W. Washington, D. C. 20006, and Julian Freret, Esquire, 1110 Vermont Avenue, N.W., Washington, D. C., 20005, this 11th day of April, 1969.

/s/ ROGER E. ZUCKERMAN
ROGER E. ZUCKERMAN
Assistant United States Attorney